VAKEEL, HIGH COURT BHOWANIPUR

The Madras Law Journal.

[PART I. JANUARY 1897. VOL. VII.]

RIGHT OF REPRESENTATION UNDER THE MITAKSHARA—A REPLY.

I propose to discuss in this article the question whether under the Mitakshara School of Hindu Law a grandson by a predeceased son is, in a case of inheritance proper, excluded by the surviving son of a deceased Hindu. This question has already received the attention of 'A Lawyer' who in an able contribution appearing in the VIth Volume of the "Madras Law Journal" examined the texts, and the case-law bearing upon the subject and landed at a conclusion in favour of the exclusion of the grandson by the surviving son. But as I apprehend that the conclusion so arrived at is not quite in keeping with the authorities bearing on the subject, I feel emboldened to express a note of dissent from "A Lawyer's" position and to lay before the reader my reasons for affirming the contrary.

In dealing with this question we have to ascertain—(1) the nature and the scope of the so-called doctrine of representation; (2) the nature of the interest, if any, which the son and the grandson have in the separate or self-acquired property of the father or the grandfather; and (3) the scope of the principle of inheritance that to the nearest sapinda the inheritance next belongs. We shall now proceed to consider these points in their order in view to a satisfactory solution of the question proposed.

The so-called doctrine of the right of representation is accepted, commented upon and illustrated by modern text-writers on Hindu Law, although ancient texts do not, so far as we are able to see, enunciate any principle which deserves to be called by this name. This right of representation is defined as the right which the male issue of a deceased co-parcener have to represent the right of their

ancestor to a partition and claim the share which he would have taken at a partition. (Mayne's Hindu Law, S. 432.) That this doctrine applies in all cases of partition of co-parcenary property is clearly laid down by all text-writers; but whether it applies to any cases of inheritance properly so called is a point upon which no text-writer is clear. Indeed Sarvadhikari says: 'The son, the grandson and the great-grandson successively inherit the property of the deceased. The son excludes the son's son, and the grandson excludes the great-grandson. Sons share equally *per capita;* but those who, like grandsons, take *jure representationis* inherit *per stirpes, i.e.,* they take that share only which he whom they represent would have taken had he been alive. The right of representation is admitted as far as the great-grandson; so that a grandson whose father is dead, and a great-grandson whose father and grandfather are dead, participate equally in the inheritance with the son. But, during the lifetime of their parents, neither the grandson, nor the great-grandson, is entitled to the inheritance. They are excluded by their father and grandfather." (Sarvadhikari's Hindu Law Lectures, p. 881.) But this passage is very far from clear as the opening portion of it appears to lay down that the son excludes the grandson who in his turn excludes the great-grandson, while the concluding portion of it seems to lay down the simultaneous succession of the son, the grandson and the great-grandson to the property of a deceased Hindu. Supposing, however, that this passage clearly lays down such simultaneous succession, it might still be contended not without some degree of plausibility that the passage in question has reference to cases of succession under the Dayabhaga School of Law—an objection supported by the context in which this passage occurs. There is one point, however, upon which all text-writers are agreed, and that is, that this right of representation stops short with the great-grandson. The text upon which the doctrine of the so-called right of representation is based and supported is the latter hemistich of Sloka 120 of Chapter II, Yajnavalkya's Institutes, which, when rendered into English, reads thus: "Among grandsons by different fathers the allotment of shares is according to the fathers." (Col. Mit., Chap. I, S. V., para. 1.) To determine accurately whether any principle like that indicated by the expression 'right of representation' could by any effort be squeezed out of this text, it is necessary to

understand its context and the purpose which it is intended to serve. After establishing in a lengthy disquisition at the very commencement of his commentaries on Yajnavalkya that the son and the grandson acquire a right by birth in the property of the father and grandfather, the author of the Mitakshara says: "In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a subsequent text." (Col. Mit., Chap. I., S. 1, para. 33.) The author then proceeds to comment upon Yajnavalkya's text regulating the time and the mode when and in which a partition of the father's property among his sons should be made. With the first hemistich of verse 120 of Yajnavalkya this is done and the author then introduces the second hemistich in the following way: "The distribution of the paternal estate among sons has been shown; the author next propounds a special rule concerning the division of the grandfather's effects among grandsons." (Col. Mit., Chap. I., S. V., para. 1.) It is thus clear that this second hemistich, the only foundation upon which the doctrine of the so-called right of representation is built by modern text-writers, could not possibly have been intended to confer upon the grandsons a right to partition which they could not have claimed but for this text. It was simply intended to point out the mode in which the property should be divided among grandsons in whom a right to partition was manifestly admitted to exist. This reasoning is quite obvious, and to make assurance doubly sure we need only refer to the opening words of Vijnaneswara's commentary on this text: "Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distribution of the grandfather's property must be adjusted through their fathers and not with reference to themselves." (Col. Mit., Chap. I, Sec. V., para. 2.) The view we have taken is further supported by the principle laid down by Vijnaneswara in the discussion introductory to his commentary on the Dayavibhaga chapter that partition is the consequence of a pre-existing right. Again, far from creating a right in the grandson, this text clearly operates in curtailment of the grandson's rights—an assertion easily proved by supposing that this text had been elided. On this supposition every grandson who by birth acquires an interest in the grandfather's property quite like a son would be entitled to an equal share with a son at a partition of the grandfather's property on the well-recognised

principle that equality is the rule where there is nothing laid down to the contrary. Thus where a Hindu dies leaving family property and a son and two grandsons by a son pre-deceased, the two grandsons would count for two and the surviving son for only one at a subsequent partition, and thus make the position of the surviving son worse than if their father had been alive at the date of partition. To avert this anomaly arising from the equal right by birth of the son and the grandson in the grandfather's property, Yajnavalkya lays down a special rule, that the grandsons by the same son, whatever be their number, shall together take only what their father would have taken, if alive, at the date of their grandfather's death.

Another patent circumstance shewing that nothing at all resembling the so-called doctrine of the right of representation was ntended to be laid down by the passage in question is this. At the end of the commentary on this passage, the author of the Mitakshara anticipates certain objections tenable only on the hypothesis that this passage conferred upon the grandsons a right of succeeding to the property of their grandfather under the conditions therein expressed and implied. The objections in general language amount to an assertion that the grandson could not claim a partition under conditions other than those laid down in this passage; and the author of the Mitakshara meets these objections in his commentary on the following verse, *i.e*: "The ownership of the father and the son is the same in land which was acquired by the grandfather or in a corrody or in chattels (which belong to him)." (Mit., Chap. I, S. 5, para. 3.) "In such property," says Vijnaneswara, "which was acquired by the paternal grandfather through acceptance of gifts or by conquest or other means as commerce, agriculture or service, the ownership of father and son is notorious: and therefore partition does take place. For, or because, the right is equal or, alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share. Hence, also it is ordained by the preceding text that the allotment of shares shall be according to the fathers, although the right be equal." (Col. Mit., Ch. I., S. V, paras. 5 and 6.) It is thus clear that the author of the Mitakshara makes no attempt to bring the hypothetical cases within the language of the preceding text, but explains away the objections

formulated by the 'notorious' equality of the right of the father and the son in properties acquired by the grandfather. We have thus no doubt that there is nothing corresponding to the doctrine of this right of representation to be found in original texts and that there is no text at all from which this doctrine could by any process be evolved.

But conceding for the purposes of argument that such a doctrine is laid down, directly or indirectly, in the Hindu Law texts, it still remains for us to ascertain whether this right is either expressly or impliedly confined to cases of succession by survivorship or partition of co-parcenary property, or whether it applies even to cases of inheritance properly so called. Mr. Mayne's definition of this right is not, we apprehend, quite correct; for supposing that this doctrine were deducible from the passage in question, there is absolutely no warrant for restricting this doctrine to cases of partition of co-parcenary property alone. It is obviously erroneous to think, as Mr. Mayne seems to have thought, that the texts relate to partition only of a joint-tenancy; for there may be need of a partition even in cases of tenancy in common. It may be said that, from the particular context of this passage, its applicability only to cases of partition of joint-family property could be inferred. This may well be met by a categorical denial and may be refuted by showing how both Yajnavalkya and Vijnaneswara do not apparently draw any distinction between cases of succession by survivorship and cases of inheritance proper so far as the rights of the son, the grandson, and the great-grandson go; but as this course would require much space, and as we find an easier solution for this particular difficulty, we are content to follow the shorter course. Now we ask, if this doctrine of the right of representation deducible from the passage is confined strictly to cases of partition of co-parcenary property and has no manner of application in cases of inheritance proper, how is the allotment of shares among grandsons under similar circumstances to be regulated in a case of inheritance proper? If A, a Hindu, dies leaving separate or self-acquired property, both his sons having pre-deceased him and leaving him surviving, two grandsons by one of them and three by the other, how then are these five grandsons to inherit? Is the division of the inheritance among these five grandsons to be *per capita* or *per*

stirpes? Of course, it would be readily answered that the division would be *per stirpes*. But by what text would that answer be supported? Search all the Mitakshara for one and you will have to rest your answer upon this very text, which, it was contended, applies to cases of partition of co-parcenary property alone. It is faintly suggested that as there is no text regulating the division of property among grandsons by different fathers in a case of inheritance, the mode of division pointed out by this text should on analogy be resorted to in cases where grandsons by different fathers inherit property simultaneously. We are at this point tempted to ask whether on the same line of reasoning the principles regulating the simultaneous succession by survivorship of sons, grandsons and great-grandsons in respect of co-parcenary property may not be applied in their integrity to establish the simultaneous succession by inheritance of sons, grandsons and great-grandsons in respect of the separate or the self-acquired property of the Hindu, considering the fact that there are no special texts to be resorted to in the latter case. But we are sure to be informed that the right of the son, the grandson and the great-grandson *inter se* in cases of inheritance is regulated by a well-known and well-defined principle, and so we pass on to discuss the scope of that principle.

This principle is no other than that of propinquity expressed in the rule "to the nearest sapinda, the inheritance next belongs." (Manu, Ch. ix. 187.) In order to understand clearly the exact scope of this principle of inheritance, we must realize its context. The Dayabhāganirnaya begins with verse 104 of the ninth chapter. Manu discusses the question of the time and mode of partition of father's property among sons, firstly, born of the same mother, and, secondly, born of different mothers of the same or different castes. He then defines the twelve sorts of secondary sons and discusses their individual and relative rights to inherit their father's property. This takes him to the end of verse 184 of the chapter, and then he sets about 'to determine the order of heirs entitled to inherit the property of a deceased sonless Hindu.' He says, "Not the brothers, not the parents, but the sons take the wealth of the father. The father and the brothers also take the wealth of the sonless deceased. To three should libations of water be offered, to three is the offering of rice-balls ordained, the fourth is the giver of these, and the

fifth has no concern. To the nearest sapinda the inheritance next belongs, and in default of these to the sakulyas, or the preceptor, or the disciple." (Manu. Ch. ix, 185—7). It is here seen that the ruling principle of inheritance, *i.e.*, that the inheritance next belongs to the nearest sapinda is for the first time laid down by Manu to determine the order of heirs to the property of a deceased sonless Hindu; and as we are entitled to assign a motive for Manu's enunciating this doctrine at this point of the devolution of property, we feel warranted in concluding that this doctrine was not intended by Manu to apply in cases where sons, grandsons and great-grandsons take the property of the deceased as his heirs, and when we consider what a high standard of merit was usually assigned by the ancient text-writers to brevity, we cannot help thinking that this doctrine would have been enunciated in an earlier portion of the chapter, if it was intended to govern cases of inheritance by the male issue of the deceased. In this connection the opening words of the gloss of Kullukha Bhatta on verse 187 are significant. The commentator thus introduces this verse: "As this general principle will become superfluous, if it was intended to apply to the case of sons, etc, already referred to, this is said for the purpose of enabling the wife, etc., not already spoken of to inherit the property of the deceased." This makes it clear that, although this principle of inheritance could apparently be well applied in the case of the sons inheriting as heirs, such application would be superfluous as the rights of these as heirs have been already regulated by some well recognised principle. What that other principle is, is not far to seek. It is the principle, the fundamental principle of the Mitakshara School of Hindu Law, that the sons, the grandsons and the great-grandsons of a Hindu have a right by birth in his property, ancestral or separate, or self-acquired.

In a lengthy disquisition at the commencement of the portion of Vijnaneswara's institutes that relates to Dayavibhaga, the author of the Mitakshara examines the ancient texts bearing on the subject of right by birth and asserts, as the conclusion he arrives at, that the male issue acquire an interest by birth in the property of their progenitor. 'A Lawyer' concedes that the word 'Daya' is used by the author of the Mitakshara in an extended sense so as to include property liable to the incidents of co-parcenary and

separate and self-acquired property, the subject-matter of inheritance. It is thus clear that, according to the author of the Mitakshara the male issue of a Hindu acquire a right to his property irrespective of the character of that property. At the conclusion of the disquisition Vijnaneswara says, " In respect of the right by birth to the estate, paternal and ancestral, we shall mention a distinction under a subsequent text." (Col. Mit., Ch. I, Ss. 2 and 33). This text, it will be easily seen, is no other than verse 121 of Ch. II of Yajnavalkya. " For the ownership of father and son is the same in land which was acquired by the grandfather or in corrody or in chattels (which belong to him)." (Col. Mit., Ch. I, S. V, 3). About the end of the commentary on this verse the author of the Mitakshara thus sums up the result of the authorities examined on the subject. " Consequently the difference is this: although he have a right by birth in his father's and in his grandfather's property, still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction." (Col. Mit., Ch. I., S. V, 10.) Vijnaneswara thus holds that the son acquires a right by birth even in the father's self-acquired property, and that the son and the grandson acquire equal rights by birth in the grandfather's self-acquired property; only, the son has no independent power over the self-acquired property of the father. Nor is Vijnaneswara alone in this assertion. The author of the Smriti Chandrika also holds that *svathanthryam* (independent power) is not always co-existent with *swamyam* (ownership), and that there can be ownership without independent power of disposition as in the case of the son in respect of the wealth of the father. This view is also supported by what Manu says, "Let the brothers assemble after the death of their father and mother and equally divide the paternal wealth; for so long as they live, these have no power over it." (Manu, Ch. IX, 104.) Here the ownership of the sons in the property of their father is not denied; but all the same they cannot enforce their rights, because they have no independent power. All these authorities show that, according to the ancient texts, the son and the grandson acquire a right by birth in the property of the father and the grandfather, whether ancestral

or self-acquired, and that in the case of self-acquired property the right could not be exercised owing to the superior rights of the acquirer himself in that he has both the ownership of such property and the independent power to dispose of it. The right by birth exists in both cases; but in the one case, *i.e.*, in the case of ancestral property, it could be asserted at the option of the owner of the right, whereas in the case of self-acquired property this right by birth which the son and the grandson have, cannot be asserted at their option, because the living acquirer has, as being the acquirer, a predominant interest.

On a consideration therefore of these facts, we believe that the doctrine that the inheritance next belongs to the nearest sapinda has no application to cases where a deceased Hindū leaves any male issue down to the fourth generation and that the sons, the grandsons and great-grandsons inherit the estate of the deceased by virtue of their right by birth in the property of the deceased.

Our opinion that the rights of the son, the grandson and the great-grandson as much in cases of inheritance proper as in the case of succession to joint family property are governed by the same principle is considerably strengthened by the fact that in none of the ancient texts that treat of property and its devolution, the subjects of partition and inheritance are separately discussed. Vijnaneswara treats of partition among sons and grandsons and without saying a word as to the relative rights of sons, grandsons and great-grandsons in cases of inheritance abruptly begins to determine the order of heirs entitled to inherit the property of a Hindu dying without sons. Manu, as we have already said, discusses the rights of sons, primary and secondary, in the property of their father and suddenly proceeds to determine the heirs to the property of a deceased sonless Hindu. So do the authors of the other Smritis deal with the subject of partition, and that done, proceed immediately to assert the right of the widow, the father or the mother of the sonless deceased as the case may be. We need not add that the word 'sons' used by these authors includes sons, grandsons and great-grandsons. The omission therefore on the part of these ancient lawgivers to treat the subjects of partition and inheritance separately and to formulate different principles regarding each is, in our view, a strong and clear indication that

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those writers consider partition and inheritance as regulated by the self-same principle. It is also noteworthy that those writers who have so much to say about the preferential right as heir of the widow, the mother or the father of the deceased, have not a word to say about the relative rights of the son, the grandson and the great-grandson, in cases of inheritance. This omission considering the large number of Smriti writers can be explained only on the hypothesis that they saw no reason to choose between the son, the grandson and the great-grandson as heirs of their deceased common ancestor. On an examination therefore of the texts, ancient and modern, bearing on the subjects of partition and inheritance, we have little hesitation in coming to the conclusion that the doctrine of the right of representation is foreign to the genius of the Hindu law as gatherable from the ancient texts and that its acceptance by modern writers on Hindu law is altogether unaccountable, that the doctrine of Manu that to the nearest sapinda the inheritance next belongs, applies to the heirs of a Hindu dying without male issue, and that so far as the son, the grandson and the great-grandson are concerned, their rights of inheritance are governed by the same principle as their rights of partition in co-parcenary property, and that as heirs, the son, the grandson and the great-grandson have equal rights. We now proceed to examine the case-law upon the subject.

The case-law as regards the point at issue is very meagre. There is to be found among reported cases only one case in which the point came up directly for decision. In *Luchomun Pershad* v. *Debee Pershad*, 1 W. R., 317, the grandson of a Hindu (governed by the Mitakshara Law) by a pre-deceased son was found entitled to share equally with the surviving son of his grandfather in the grandfather's self-acquired property. The authority of this decision is, however, questioned on the ground that the point raised was neither discussed nor considered fully. But the process of reasoning by which their Lordships arrive at the conclusion is clearly indicated in the judgment and shows that the arguments, *pro* and *con*, have been considered. Their Lordships observe that the Hindu Law texts enunciate no principle from which the son's preferential right over the grandsons to inherit the self-acquired property of the grandfather could be deduced or inferred, that the word '*putra*' or son included a man's lineal descendants to the fourth generation and

that therefore they could draw no distinction between the son, the grandson and the great-grandson as heirs. Indeed, the judgment is to some extent based upon the fact that counsel engaged to plead the cause of the son were not able to refer their Lordships to any texts accepted as authoritative under the Mitakshara School of Law in support of the son's preferential right, but that is no ground for supposing that counsel omitted or neglected to rely on authorities which could be availed of. Nor is there any reason afforded by the language of the judgment to lead us to think that their Lordships' judgment was in any measure influenced by the circumstance of the son or the grandson, or both of them having been living with the deceased grandfather on the date of his death. In answer to the contention raised on behalf of the son that the grandson had been virtually excluded from the inheritance during the lifetime of the grandfather, their Lordships found that the facts on the record did not go to substantiate that portion of the defence. Seeing that the property in suit was admittedly the self-acquired property of the grandfather, we fail to see the possibility of their Lordships being influenced in their judgment by their finding just above referred to. We next refer to the observations of Mr. Justice Muthusami Aiyar in *Muthuvaduga Natha Tevar* v. *Periyasami*, I. L. R., 16 M., 14. In the course of that judgment the learned Judge observes: "As for obstructed and unobstructed heritage (*Sapratibandha* and *Apratibandha*), the distinction is material only to the extent that in the one case the nearer male heir excludes the more remote, whilst in the other the doctrine of representation excludes this rule of preference . . . . Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed, with this difference, *viz.*, that when the last full owner leaves sons, grandsons and great-grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same and that they are all co-heirs within the meaning of the rule. Hence it is that the text of Yajnavalkya, Mit., Ch. II, Sec. 1, verses 2 and 3, premises the death of a male owner without a male issue." These observations are certainly *obiter dicta*, but they have nevertheless their own value as those of an eminent Hindu Judge. The portion of the passage quoted on which we lay particular stress is the portion not quoted by 'A lawyer' in his article, *i.e.*, the

last sentence that shows that Yajnavalkya's text does not, so far as the Judge was able to understand it, contain any principle which would warrant our choosing between the son, the grandson and the great-grandson as heirs to an inheritance. We next go to the observations of Mr. Justice Telang in *Apaji Narhar* v. *Ramchandra Ravji*, I. L. R., 16 B., 29. In the course of his judgment the learned Judge observes:—"Even when the property is the self-acquired property of the grandfather, the grandson by birth acquires a right to it even while it is yet in the grandfather's hands; such right is doubtless liable to be defeated by the exercise of the dominant right of the grandfather as the acquirer, but not being so defeated by any act of the grandfather, it attaches upon his property in the same way as the right of the grandfather's sons themselves. It is not a right to receive a share of that which the father may receive on a partition; it is a right in and to the property itself, like that of the father, and co-equal with it." It must, of course, be conceded that these observations are alike *obiter dicta*; but proceeding as they do from that talented Judge, they are entitled to considerable weight. It is urged that these observations and the view taken by their Lordships in *Luchoman Pershad* v. *Debee Pershad*, 1 W. R., 317, have little or no value as they are inconsistent with the principle of the decision of their Lordships of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 286. In the course of that judgment their Lordships indeed observe:—"Property in the paternal or ancestral estate by birth under the Mitakshara is so connected with a right to partition that it does not exist where there is no right to it." On the strength of this passage 'A Lawyer' argues that it is impossible to conceive of the right by birth which the son and the grandson are alleged to acquire in the self-acquired property of the father and the grandfather. We are afraid that this passage has not been properly construed. To our thinking, the expression 'where there is no right to it' is synonymous with the expression 'where—from the nature of the estate it is not liable to partition.' The passage does not and cannot mean that the absence of a present right to partition of an estate argues an absence of vested interest in the estate; for, otherwise it would amount to laying down that the grandson whose father is living acquires no right by birth in the

ancestral estate in the hands of the grandfather, seeing that he has no present right to partition. It is also noticeable that subsequent to this decision vested rights have been recognised by courts to exist even in cases where there was no present right to partition. The next case to which we refer is *Ramappa Naickan* v. *Sithammal*, I. L. R., 2 M., 182. The competition in that case was between the divided son and the widow of the deceased Hindu. Their Lordships in upholding the preferential right of the divided son rested their judgment mainly upon the principle of Hindu Law that the male issue have an unobstructed right of inheritance. 'Male issue,' or for the matter of that even the word '*putra*' or son, includes the son, the grandson and the great-grandson, and if it were correct law that the son excludes the grandson by a pre-deceased son on the ground of being the nearer sapinda, we fail to see how the grandson's right of inheritance that could be obstructed by the existence of his paternal uncle could be said to be unobstructed. At page 183 their Lordships quote with approval a text of Baudhayana cited in West and Bühler, 2nd Edition, page 535, and itself based upon the texts of Sankha and Likhita to the effect that a son or other male descendant is consubstantial with his father or other ancestor. This text clearly shows that the son, the grandson and the great-grandson are equally near as sapindas to their deceased ancestor, thus showing that even on the doctrine that to the nearest sapinda the inheritance next belongs, the son cannot exclude the grandson from the inheritance.

A word more and we have done. 'A lawyer' contends that 'whatever doubt may possibly exist in regard to the succession to the self-acquired property of the grandfather, there can be very little doubt as to the succession to the property of a grandfather who in his lifetime became divided from his son and has died leaving his separate property and sons and grandsons by deceased sons.' We confess we do not understand the process of reasoning by which this assertion is supported. The only effect of a partition between the father and the son is in the language of their Lordships in *Ramappa Naickan* v. *Sithammal*, I. L. R., 2 M., 182, at p. 184. "To free so much of the estate as falls to the lot of his father from any *present* proprietary right on the part of the divided son." The son, therefore, takes the property of his father on his death just in the same way as he would take it

by survivorship, if there were no partition between himself and his father. Similarly, where the grandfather was divided from both his sons and died leaving property obtained at the division and one of his sons and a grandson by the pre-deceased son surviving him, the grandson and the surviving son would by virtue of their being alike the male issue of the deceased, inherit the property in the same way as they would succeed to it by survivorship, if he had died undivided from them.

On these grounds, therefore, we are constrained to differ from 'A Lawyer' and to hold that the surviving son and a grandson by a son pre-deceased would inherit equally the property of the grandfather, whether separate or self-acquired.

S. SITARAMA SASTRI.

DOCTRINE OF SURRENDER OF A WOMAN'S ESTATE TO THE NEXT PRESUMPTIVE REVERSIONER.

Under this heading, I propose to consider those cases where a widow or other female owner possessing a limited estate under Hindu Law proposes to surrender that estate at once absolutely (and during the life-time of the limited owner) to the next presumptive reversioner, so that the estate may become vested at once in the latter in such a way that the same will upon his death pass to his heirs without reference to the heirs of the male owner from whom the female heir took it.

Let us first see how the matter stands on principle before entering into a discussion of the authorities.

In the first place, it must be mentioned that the present question involves the renunciation of a vested right by a widow in favor of her husband's nearest heir for the time being and not the disclaimer by her at the time the succession opened (*i.e.*, the demise of the husband) of her right to call for the possession of the estate. In other words in the matter under consideration there is no question of disclaimer, but there is a relinquishment by the widow (or other limited owner) of her right in her husband's (or the last full owner's) estate after she had entered upon or accepted the inheritance and the estate had thus completely vested in her.

If she said that she did not want the inheritance at the time of the husband's death and before she had entered upon (or accepted) the inheritance, then clearly she could do that and her refusal will operate to accelerate the estate of the remoter heir (*i.e.*, the heir of the husband next to that of the widow). But she could do so only once. The election can only be exercised once and that, at the time of the husband's death.

In English Law the inheritance is regarded as being vested in the next heir, and when the latter disclaims, it is loosely regarded as being the renunciation of a vested right. Perhaps it is more correct to say that what is vested is only an inchoate right. That inchoate right becomes perfected (from the moment of the death of the last owner) when the heir does not expressly disaffirm the inheritance.

No doubt the heir is given an option to refuse. But when he refuses, the refusal has reference to the date of the death of the last owner and the then next heir takes from the last date. Still the inheritance is not in abeyance. For, when the immediate heir refuses, the inchoate right of the remoter heir becomes perfected and the inheritance is deemed to be vested in him from the moment of the last owner's death. When the remoter heir succeeds he takes as the then nearest heir of the deceased and not as heir of the nearer heir who has refused. So that virtually even in the English Law there is a marked difference between a disclaimer and a renunciation. *See* Phill., p. 2411, Code Napoleon, Arts. 775, 777 and 785.

To return directly to our subject, succession opens in all systems of jurisprudence only in two cases. *See* Code Napoleon, Art., 718 and Dhayabhaga, verses 1, 2 and 31.

(1) Natural death, which needs no separate mention.

(2) Civil death.

It is useless to waste our time by considering what civil death means in other systems of law. But under the Hindu Law civil death occurs when a person becomes an outcaste or enters the religious order. Civil death by becoming an outcaste or losing status has now lost much of its importance. An Act (XXI of 1850) of the Legislature has been passed removing any disability on

account of loss of caste or degradation. Entrance into religious order arises in three cases—

(*a*) Where a person has become a hermit.

(*b*) Do. has become an ascetic who gives up all worldly concerns and devotes himself to the meditation of God or *Brahman.*

(*c*) Do. is a *Brahmachari* or professes to be a perpetual religious student. *See* Mayne, para. 517 (3rd Edition) and Mitakshara, Ch. 2, Sec. 10, p. 3 (note).

Besides these two classes of cases where succession opens, there seems to be a class of cases which does not fall strictly under either of the above two heads, but yet may be said to come within the second of the cases above referred to. For *Narada* has said, (2 Col. Dig., p. 197.) "The father being degraded or become an anchorite, or *having resigned*, or, deceasing naturally, his sons may divide the estate." This may, no doubt, have reference to a joint family and to partition. But, under the Dayabhaga, sons have no right by birth, and moreover the verse occurs in a chapter which treats of succession. This is explained by *Jagannatha* thus: "Resignation annuls property, and it is ultimately the same with abdication; for the cessation of wish for worldly concerns, accompanied by a declaration in this form 'henceforward I will not act in worldly affairs' annuls the right of property; afterwards, when he again desires worldly concerns, still property is not revived."

In the case above referred to, the person, no doubt, expresses no desire for worldly concerns, but he need not take to devotion. It is a sort of *quasi* civil death. No doubt it implies no moral turpitude. But at the same time it does not convey any idea of that kind of spiritual superiority wherein the hermit by his undistracted devotion to *Brahman* arises far ahead of all materiality and feels himself in a position to discern *Brahman.* It has only a negative element, *viz.*, the absence of desire for all worldly concerns. But the positive element, *viz.*, the devotion to God is wanting, or is not to be found to the same extent.

Taking it that this verse refers to a case of succession, and that when the conditions mentioned therein are fulfilled, a case of suc-

cession arises, we have to see what those conditions are. The commentator says that resignation means abdication and annuls property. So that, when a person makes a declaration in this form, "henceforward, I will not act in worldly affairs," his title to property ceases and succession opens so as to let in the next heir, and the fact that the person again desires worldly concerns does not revive his title and does not divest the next heir of his vested right. Hence, therefore, if a person makes the declaration aforesaid without more, *i.e.*, without transferring it to another, then alone succession could open.

In this connection it may be useful to refer to the Roman Law. The renunciation of a right (renunciatio) in the true sense of the word is the legal act by which a person abandons a right acquired, but without transferring it to another. "What then is the effect of this renunciation?" The author goes on to say: "In the case of a right not yet acquired, it is universally admitted that a unilateral declaration of volition, having a renunciation for its object, bound its author and was irrevocable." Then the author points out that there is a difference of opinion as regards the question "whether a right actually acquired could be abandoned without the concurrence of him who profited by the renunciation, or in other words, whether the volition of abandoning an acquired right, once declared, was obligatory upon him who had expressed it, or whether he could revoke it at his pleasure." Then he says, that the preferable opinion is that which considers that in the case of real rights the isolated declaration (or unilateral act) was sufficient to complete the renunciation. *See* Goudsmith, p. 141.

The effect of renunciation or abandonment by a full owner seems then to be in Roman Law to make the property so abandoned or renounced as *res nullius*, so that if any person other than the person renouncing becomes the next taker, the person who renounced cannot revoke his former declaration of will and cannot wish to have a desire again for the property and take the same back again from the next taker. But if nobody has taken it in the meantime, he can himself become the next taker and take back the property if he wishes to have a desire again for the property. Hence two conditions must concur: (1) a person capable of renouncing and having the full rights of ownership. (2) The withdrawal of that ownership by that per-

son with intent to give up all rights over it. Hence as will be shewn presently the right of the usufructuary cannot be so given up as to make it *res nullius*. *See* Sandars' Institutes of Justinian, pp. 116 & 116.

If then the above text of *Narada* is applicable to the law of succession, there seems to be a difference between the Roman and Hindu Law. For the text considers that it is a case where succession opens. The text itself does not occur in other books of authority in the various schools. But it must be observed, the injunction of the text and the meaning of the author should be strictly followed, and, unless there is in the person renouncing no desire for worldly concerns which he shows by giving up all interest in all his property, succession will not open. A partial renunciation will not do, for that shows there is the desire for worldly concerns, and the effect of such a partial renunciation is to make the property *res nullius* (*i.e.*, abandoned by the owner).

The true test then is whether the person gives up his desire for worldly concerns. If he does so, then, according to *Narada's* text, succession opens and the next heir takes. If he does not do so, but retains his rights over other property and wishes to renounce his rights as regards a portion, or if having a desire for worldly concerns, he renounces all his bundle of rights in order that he may be able to enjoy better other worldly desires which he prefers, then, there is merely, an abandonment, or sleeping over of rights. The effect of mere abandonment by a *full* owner is to make property so abandoned *res nullius*, while that of sleeping over or non-user is not necessarily to make the property *res nullius*. The effect of abandonment or non-user by a *limited* owner is different.

In this connection, it may be useful to refer to the Roman Law of usufruct. An usufruct is said to be extinguished in Roman Law in the following among other ways :—

(1) By non-user within the limited time.

(2) By surrendering to the owner; but a cession to a stranger has not this effect. The stranger though not the owner of the usufruct can exercise the rights of the usufructuary until the latter dies or loses the servitude.

(3) By merger or consolidation as where the ownership becomes vested in the usufructuary, in which case the latter becomes the full and absolute owner.

When a usufruct determines, it reverts to, and is reunited with the ownership, and he who before was but bare owner of the thing, begins to have full power over it.

When there has been non-user by the usufructuary, then the owner may be in possession in which case by usucapio (after a certain time) the burden is completely relieved; or a stranger may be in possession. In the latter case if the stranger is in possession for the limited time, the effect seems to be that the usufructuary is completely barred, but as no usufruct can be acquired by prescription, the stranger must give up possession to the owner who thereby gets full power over the property. Before the limited time, however, the usufructuary can recover from the stranger.

The effect of abandonment of the usufruct (which is more than non-user) seems also to be the same, *i.e.*, the usufruct reverts to, and is reunited with, the ownership. It must be noted here that both the usufructuary and the owner have vested rights (under the Roman Law) and cases 2 and 3 resemble the surrender and merger of lesser estate in the English Law of Property.

The ultimate effect in Roman Law of non-user and abandonment by a usufructuary is not to make the usufruct *res nullius*.

But in Hindu Law, non-user by a widow the nature of whose estate is quite different from that of usufructuary produces the following results:—

(*a*) Where a stranger gets possession of the property and is for more than 12 years, the reversioner cannot get possession immediately, though the effect of the limitation may be to bar the widow. The reversioner can only sue after the death of the widow and if he is the nearest heir to this last full owner, he will be entitled to succeed.

(*b*) Where the reversioner is in possession for 12 years, the widow may be barred, but if he dies before the widow, then his heir or whoever may be in possession must give up the estate to the then nearest reversioner who is the preferential heir to her husband.

It may be noted that the reversioner in the Hindu Law does not answer the description of bare owner in Roman Law of the thing which is the subject of usufruct. The reversioner has no vested interest.

In Roman Law, then, renunciation or abandonment by a full owner is to make the property *res nullius*, while it is otherwise in the case of an usufructuary. In the case of a mere non-user by a full owner. the property does not become *res nullius*, but if the prescribed time runs against him, the stranger in possession gets a complete title.

In the case of abandonment and that of non-user by the usufructuary for the prescribed time, the usufruct is extinguished and reverts back to the owner who then has full rights of enjoyment. Non-user for a shorter time has no effect.

In Hindu Law, the effect of abdication (or renunciation) by the widow, or by the full owner, is to open the succession under the authority of the *Narada's* text. In the case of mere abandonment (*i.e.*, of portions of property) by a full owner, the effect is to make the property *res nullius*. But if a limited owner as a widow abandon portions, it may be binding against the widow, but it does not affect the reversion. In the case of non-user by the full owner, the property does not become *res nullius*, but it may be acquired by prescription by anybody. In the case of non-user by a limited owner or a widow, the effect is the same, but only a limited interest can be acquired, and the reversion is not in any way affected.

Beyond this abdication cited in 2 Col. Dig., p. 197, there is, it is submitted, no case where succession can be said to open. If, therefore, the person not intending to renounce temporal concerns and to abdicate all his rights in his property so as to let in the next heir by act of law and in the manner indicated by it, wishes to relinquish his rights already vested in the property to the next heir (though it may be) by a pure act of his own and without reference to the law, he is simply transferring by a pure act *inter vivos* his rights, whatever they may be, in the property, and the transferee can take no more. The fact that the next heir is concerned, is merely *accidental* and cannot enlarge the rights which an ordinary person can have under such a transfer. He can only have such

rights as his transferor has, and can take only such interest as the transferor possesses. If the person to whom the rights are relinquished is a perfect stranger, no question can arise as to the character of the transaction. Hence the fact that the next heir was concerned in it could not affect the nature of the transaction and could not convert what was a pure case of transfer *inter vivos*, into one of succession.

It cannot be conceived how a case of succession can arise under the circumstances set out in the preceding paragraph. If there be a relinquishment by a person to his next heir, then it cannot be said that the latter takes by succession. For succession is one of two kinds—(1) Intestate, (2) Testamentary. See Act X of 1865, S. 2.

Intestate succession is a case where a person dies without making any disposition by will and appointing an heir. The law appoints the heir and says that the property shall devolve in such and such a manner. Here the person transfers his rights by an act of his own. It could not be said that he has made no disposition of his property during his lifetime.

Then could it be said that it was a case of testamentary disposition? The bare statement of it is a complete answer to the question. Testamentary succession is where a person dying leaves a will disposing of his property in the manner therein provided, (and a person who is civilly dead cannot dispose of property by will, for in theory he has none, and if he has any he cannot then be said to be civilly dead), so as to take effect only after death. Here then is a complete transfer, which takes effect at once and during the lifetime of the transferor.

If the above view be correct, then the fact that a female intervenes and that such female possesses only a limited estate cannot in any way affect the question. Where the widow wishes to relinquish her rights in the property in favor of her husband's heir, she merely transfers her interest in the property by a bare act of volition on her own part to the next reversioner, and the latter can only take such rights as the widow herself has. On his predeceasing the widow, his heirs may, so long as the widow lives, remain in possession of the estate, but if she dies, and if they are not the husband's heirs, they must give up the property to the

person who is the actual heir of the husband at the time of the widow's death. For the deceased reversioner (who would have been the next heir) was not in possession in *his own right*, (the property had not vested in him as the heir of the full owner), but only as transferee from the widow and could not, therefore, *transmit the estate* to his own heirs.

Then could it be said there was a confusion or merger of rights? For it may be said, the widow had transferred her rights to her husband's heir, and the latter being the next reversioner, the effect of the surrender of a limited estate to the person entitled to the reversion is to make it merge in the reversion. See Mitra on the Hindu widow, pp. 361 and 362 (and cases cited therein). We can only say that here is a confusion arising from ideas borrowed from English Law. It has been authoritatively laid down now that the widow's estate is not a life-estate, nor is the reversioner's interest a reversion as is understood in the English Law of Property. The husband's next heir had (before the relinquishment) no *vested* interest in the estate. He merely had a chance of succession, or a bare possibility. He could, therefore, not have transferred his rights (for he had none) to another so as to enable that other to keep the estate upon his (transferor's) death and when the succession falls in actually. See Phillimore, p. 89. The transferee under such a transfer could acquire no rights, for when the succession falls in, on the widow's death, the husband's heir at that time will succeed. See Transfer of Property Act, sec. 6, cl.

If then the transfer of the possibility of becoming the husband's heir will create no independent rights in the transferee and could convey none to him and is absolutely prohibited for the reason that there is no estate nor right to transfer, how, when the widow has transferred her rights to the reversioner, could her rights *in esse* (I am not here considering the cases when the reversioner is himself alive and can take as heir and he has previously transferred his rights to another which a Court of Equity in England construes as a binding agreement) could be *merged* in the bare possibility (not a right) of the husband's heir to succeed to the estate in the event of the reversioner surviving the widow? There can be no merger, for there are no higher rights which could be said to merge the lesser rights in them.

The only cases then in which the widow can during her natural life by any possibility accelerate the estate of the reversioner are the following :—

(A) A disclaimer by the widow.

(B) Civil death of the widow.

(C) *Quasi* civil death of the widow.

(D) Re-marriage of the widow.

The first three cases have already been dealt with. There is no difference in such cases between a widow and other ordinary persons.

The fourth and last case was treated in ancient Hindu Law as being a case of civil death. Now a special enactment has been made, see Act XV of 1856. We need not mention this any further.

We shall next consider the effect of the decisions having a bearing upon the matter.

The Allahabad High Court has consistently negatived the proposition that the widow and the next presumptive reversioner could by any act of their own open the succession to the last male owner so as to completely vest in the next presumptive heir an estate which the remoter reversioners who may happen to be actual heirs on the widow's death could not question. (1)

In *Ramphal Rai* v. *Tula Kuari,* I. L. R., 6 A., 116, at p. 119 and 120 the Full Bench after discussing the nature of the estate taken by the widow (or any female) and stating that it is not in the nature of a tenancy for life and that her right to alienate exists only for certain purposes recognized by the Hindu Law and that otherwise she has only a life-interest in the usufruct which she is competent to deal with, say, "she has no disposing power over it in any other sense; and, though she takes by inheritance, her right is of so peculiar and exceptional a kind that the ordinary course of succession may be said to be suspended during her life. . . . . . Apart from her capacity under the Hindu Law in certain contingencies to transfer the *corpus* of her husband's

(1) See *Ramphal Rai* v. *Tula Kuari,* I. L. R., 6 A., 116; *Madhan Mohan* v. *Puran Mull,* I. L. R., 6 A., 288; *Duli Singh* v. *Sundar Singh,* I. L. R., 14 A., 377.

estate, the only personal alienable interest with which she is competent to deal is what we have indicated above, and whether she elects to convey it to the nearest reversioner, or to a stranger, is a matter of indifference. . . It is difficult to understand how any distinction can be drawn between the rights of the nearer and more remote reversioners. They alike have an interest in expectancy, contingent on the death of the widow, the value of which as marketable commodities, if marketable at all, must turn upon their relative propinquity as heirs, but their legal worth is identical. The immediate presumptive reversioner, alike with other reversioners, has no vested interest in the succession, which, under the Hindu Law, being diverted during the widow's life into ordinary channels, only opens up on her death. And again they say, "We know of nothing in the Hindu Law to sanction the view, that a person possessed of limited rights, such as those of a Hindu widow, can, by uniting with one of many others having identical interest in expectancy on the happening of a certain event, anticipate that event and convert such individual expectancy into an immediate absolute estate of full proprietorship. If this were permissible, it would virtually confer upon a Hindu widow the right of diverting the succession to her husband's property in her lifetime when in law it only opens on her death. . . . . . If the nearest reversioner's consent alone is ineffectual to validate a transfer to a stranger, it seems to follow reasonably that it is equally insufficient to create an unimpeachable title in himself when he is the transferee (or perhaps to speak more accurately, the surrenderee). We think that the spirit of Hindu Law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt, and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words, his right and theirs have one common basis, that of survivorship to (*i.e.*, surviving) the widow, and it is incapable of anticipation."

The reasoning in effect accords with the view I have before expressed, and I would only wish the Court had gone a step further and elucidated the true principles upon which acceleration is possible and the circumstances under which it can take place.

The Calcutta High Court has taken an extreme view. They hold that not merely could the widow, by an act of her own, relinquish her interest in her husband's estate to the next reversioner so as to defeat the ultimate rights of the remoter reversioners, but that she could with the concurrence of the next reversioner alienate absolutely and without legal necessity and for a purpose of her own to any stranger or other person. For, the latter stand upon the express texts of Hindu Law upon a different footing and have never been upheld so as to bind the actual heir, unless legal necessity is shewn.

The cases where alienations with the concurrence of the next reversioner have been upheld to the prejudice of the remoter reversioners are *Mohunt Kishen* v. *Busgeet Roy,* 14 W. R., 379; *Raj Bullubh Sen Oomesh Chunder Rooz,* I. L. R., 5 C. 44; *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy,* I. L. R., 10 C. 1102 (F. B. overruling decisions to the contrary in *Gopeenath Mookerjee* v. *Kally Doss Mullick,* I. L. R., 10 C. 225, and *Ram Chunder Poddar* v. *Hari Das Sen,* I. L. R., 9 C. 463). The cases in *Radha Shyam Sircar* v. *Joy Ram Senapati,* I. L. R., 17 C. 896 and 900 (note) also uphold the same principle; but as in those cases some only of the reversioners of the same grade joined, and the alienations were set aside.

Strictly speaking the fact of the concurrence on the part of the presumptive reversioner is only a matter of evidentiary value as respects the existence of an alleged legal necessity for the alienation. But there has been a long course of decisions in Calcutta which places the two on an equal footing.*

Turning now to the question whether an absolute title would vest in the next reversioner by reason of a gift or surrender of the estate by the widow, the earliest authority of note is to be found in the case of *Sremutty Jadamony Dab* v. *Saroda Prasad Mookerjee,* Bouln., p. 121, S. C. 2 N. L. C., pp. 627 to 634. The Court (*Jackson* and *Dwarkanath Mitter,* JJ.) held that the widow could legally surrender to the next reversioner her interest in her husband's estate

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* *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah,* 8 M. I. A., 529; *Pestonjee Bezonjee* v. *Abdool Rahiman,* I. L. R., 5 B., 463.

so as to confer an absolute title in the reversioner. The reasoning seems to be that such an anticipation does not militate against the spirit of Hindu Law. *Jackson*, J., says that "the policy of Hindu Law is not to keep the estate as long as possible inalienable and subject to a species of entail unascertained but only to prevent the alienation of family property." But the learned Judge fails to note whether any method of transfer is known to Hindu Law which can have the effect of such anticipation by act of parties.(8)

In *Shama Soonduree* v. *Shurut Chunder Dutt*, 8 W. R., 500, the Court (*Jackson* and *Dwarkanath Mitter*, JJ.) upheld the surrender, and the decision is based upon the English notion of surrender of a life-estate in favor of the reversion. I have already observed upon this aspect of the point and pointed out the distinction which to my mind exists between a reversion in England, the so-called reversion of the last owner's estate when a female intervenes (in India).

In *Nofer Das Roy* v. *Modhu Soondari Barmonia*, 5 C., L. R., 551, Sc. 5 C., 732, the Court followed *Shama Soonduree* v. *Shurut Chunder Dutt*, 8 W. R., 500, and *Gunga Pershad Kur* v. *Shumboonath*, 22 W. R., 393, but *Jackson*, J., at p. 553, gave an additional reason, *viz.*, that such a surrender to the next heir is a meritorious act in Hindu Law. I can see no authority for such a view. On the contrary, the Hindu text-writers positively say that on the widow's death the estate of the husband should go to the then next heirs. on the Hindu Widow—*vide* Mitra, p. 395.

In *Gopee Nath Mookerjee* v. *Kally Doss Mullick*, 10 C. 1102, the principle of the so-called surrender and the rights of the next reversioner to whom the widow relinquishes, are considered, although the case itself is one of alienation. *Garth*, C. J., says at p. 1108, that "what is usually called a surrender of a widow's estate is more properly a relinquishment in favor of her husband's heirs. If she died a natural death, those heirs would succeed. If she were to become a byragi, or otherwise suffer a civil death, the *result would be the same;* and as I take it to be clear that when her husband dies, she might if she had so pleased have *disclaimed* the estate, there

(8) *Protab Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Chowdhrain*, 1 W. R., 98; *Gunja Pershad Kur* v. *Shumbhoonath Burmun*, 22 W. R., 393; *Raj Bullubh Sen* v. *Oomesh Chunder Rooz.*, I. L. R., 5 C. 44.

would seem nothing *wrong* or *objectionable* to her relinquishing her husband's estate to her husband's heir after she had once accepted it." There may be nothing wrong or objectionable in relinquishing or alienating the widow's own life-interest, but the question is, is it not wrong or objectionable to uphold it to the extent of defeating the rights of the remoter heirs who turn out to be the actual heirs at the time of the widow's death ? The learned Judge is cautious enough not to say that there would be a case of succession as in the two other previous instances he mentions. Obviously there can be no case of succession, and the relinquishment to her husband's heir is purely a voluntary act *inter vivos* of the widow who can give no higher rights than what she herself has (by her own act). The fact that the widow and the next heir are the parties concerned, could not alter the nature of the transaction.

The learned Judge then considers the policy of the law and points out how the rights of the ulterior heir who turns out to be the actual heir at the time of the widow's death would be defeated by recognising such a transaction. This policy the learned Judge considers might influence him if the question were *res integra,* but he would follow the law, as the current of authority in that Court was strongly in favor of that view.

This apprehension of the learned Chief Justice found justification in *Hem Chunder Sanyal* v. *Saranamoyi Debi,* I. L. R., 22 C., 354. In this case, the widow transferred the whole estate to the next heir by which act the parties supposed the title of the reversioner complete, and the reversioner would be justified in dealing with it as he pleased. He, thereupon, transferred half of the estate to the widow absolutely. Thus the transaction amounted to a division of the estate into equal moieties between the widow and the reversioner. Even the Calcutta High Court found it difficult to support the validity of such a transaction. They held that the widow had only a life-estate in respect of half the estate which had been reconveyed to her by the reversioner, but that as respects the half-share taken by the reversioner, he had taken an *absolute estate.* The learned Judges say that two propositions appear to them to be well-established :—" First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. Second, the

widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest."

As authority for the first, no doubt 19 C., 236, is referred to; but as the 1st proposition laid down above is a simple case of relinquishment without more (and not to the next reversioner), I think the learned Judges refer to the case of a disclaimer or abdication. Their Lordships go on to say: "The second proposition, though amply supported by the authority of decided cases (*Gopee Nath Mookerjee* v. *Kelly Doss Mullick*, 10 C., 1102, &c.), is not, it must be owned, reconcileable in its broad generality with the strict principle of Hindu Law, as laid down by the general authorities. According to that principle, the reversioner, after a Hindu widow, is the person who is the nearest heir to her deceased husband at the date of her death. And if by death we understand *civil death* or relinquishment of wordly interests as well as *natural death*, the first of the above two propositions will not conflict with the foregoing principle. But before the event which is to determine the actual reversioner, *viz.*, the cessation of the widow's estate by death or *relinquishment*, happens, no contingent reversioner can say that the estate will vest in him; and it is not easy to understand on what principle the widow, by making an alienation (not in the nature of a relinquishment of her estate) either in favor of the next presumptive reversioner or in favor of a third party with the consent of such presumptive reversioner, can affect the rights of the actual reversioner when the succession opens to him."

This is a clear recognition that the doctrine of the so-called surrender by a widow is not based upon Hindu Law and upon right principle, but that the course of decisions in Calcutta being in favor of upholding such a doctrine, the Judges in this case were constrained to uphold it.

In *Behari Lal*, v. *Madho Lal*, I. L. R., 19 C., 239, and 19 I. A., p. 30, the widow executed an instrument of management in favor of her daughter's son. Subsequently another daughter's son was born who claimed his share of the estate. It was contended for the reversioner who was a party to the instrument that it created an absolute title in his favor, and that, therefore, he took an absolute estate, and that the plaintiff having been subsequently born he

had no right to claim a share. The Privy Council upon the construction of the document held that it conferred only a power of management during the widow's life-time, but did not operate as a relinquishment. This finding therefore was sufficient to dispose of the case. But it contains an *obiter dictum,* which it has been contended in later cases, has the effect of recognising the principle enunciated by the Calcutta High Court, *viz.,* that the relinquishment in favor of the next heir operates as a surrender and enures to give him an absolute title. It is important to consider what the *obiter dictum* is and what its effect. At page 32, their Lordships observe: "It *may be accepted* that according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check upon the frequency of such conveyances." It must be noted that the respondent's counsel was not called upon and the counsel for the appellant only cited (as appears from the argument) a Calcutta Case, *Noferdoss Roy* v. *Modhu Soondhari,* I. L. R., 5 C., 732. Under these circumstances it can scarcely be said that their Lordships' attention was drawn to the several cases and that they then considered the point and laid down the *obiter dictum* (for the guidance of the courts). Their Lordships simply say that it *may* be accepted (for the purposes of disposing of the case before them). Hence it is submitted that this *dictum* ought not to be regarded as having settled the law and that the matter is still open for discussion. It may also be remarked that the observations seem to suggest that the reliquishment of the widow in favor of the reversioner if permissible at all should comprise the whole estate of her husband so as to amount to a destruction or withdrawal of the life-estate.

I have not been able to find any authority in point in Bombay. It may, however, be observed that widows and wives (widows) of *gotrajá sapindas* only have a limited interest and that, only over immoveables. Daughters, &c., take an absolute estate in Bombay, and generally all females have an absolute power of disposition *inter vivos* over moveables, inherited from the husband (or other male owner).

The state of authority in Madras is as meagre as it is in Bombay. In *Natha Varadia* v. *Venkatasubbia*, 2 M. L. J., 130, the *mortgage* by a mother with the consent of the then nearest reversioner was upheld, and the Court (*Collins*, C.J., and *Wilkinson*, J.) held that a person born subsequently cannot question the same. This is opposed to *Duli Singh* v. *Sundar Singh*, I. L. R., 14 A., 377. The Madras decision is based upon the assumption that if the plaintiff was born, his rights could not be prejudiced. This way of looking into the matter is, it is submitted, wrong. The fact that the person questioning was born subsequently should make no difference. It must be noted that in all such transactions, if the presumptive heir, in whose favor the transaction is entered into, dies before the inheritance falls in, the interest of the ulterior heir is always prejudiced, if it should be held that the transaction binds him. The time of birth is immaterial. It can never be said that when the transaction was entered into, there was no remote reversioner in existence, for the State will always be such remote reversioner in absence of preferable remote reversioners, among the relatives of the deceased. The ulterior reversion is ever present, though there may be change in the *person* by the birth of preferential heirs. Hence, it can never be asserted at any time that the transaction entered into with the presumptive heir could not injure the ulterior reversion on the ground that none represent the ulterior reversion at the time of the transaction, for the State will always represent it.

In *Raghava Mudaliar* v. *M. Narayanasami Mudaliar*, 4 M. L. J., 88, the facts were as follow :—Patchayappa owned (ancestral) property and died leaving two sons, Thoppai and Virabhadra. Thoppai was insane and Virabhadra enjoyed and died some years after. Patchaippa's widow, (Unnamalai) then entered into possession of the property on 8th February 1882, she executed a will with the consent of the next reversioner Vydinatha, whereby she gave the properties to plaintiff. Plaintiff brought this suit to eject the defendant alleging him to be a trespasser. The argument was confined to the validity of an alienation by will by a widow with the consent of the next reversioner (though there seemed to be some concession for the purposes of the argument that the law might be otherwise if there was a conveyance *inter vivos*). The learned Judges (*Collins*, C. J., and *Shephard*, J.) held that *Behari*

Lal v. *Madho Lal*, I. L. R. 19 C., 238, applied to the case, and that plaintiff required no title and dismissed plaintiff's suit.

In *Kolandaya Sholagan* v. *Vedamuthu Sholagan*, I. L. R., 19 M., 337, the widow had made two alienations with the consent of the next reversioner, one a sale and the other a mortgage. The sale and mortgage were found to be unreal and colourable transactions. Upon this finding of course, there remained no further question for discussion, as there was no transaction which was intended to operate. The Court (*Subrahmania Iyer* and *Benson*, J.J.) however referred to the Privy Council case above mentioned. They seem to treat the case of a sale and a mortgage on a different footing, while effect was given to neither. In treating about the mortgage they say that "even if the transaction were really a mortgage, the widow would be interested as the holder of the equity of redemption," and that her "life-estate not being at an end," the principle would not apply. If such be their meaning, the decision is in apparent conflict with that in *Natha Varadia* v. *Venkatasubbiah*, 2 M. L. J., 136. The Judges seem to be disinclined to accept in the *dictum* of the Privy Council as setting down the law. The question is still *res integra*.

Upon a full consideration of the authorities bearing on this matter the only consistent view is that the Hindu Law recognises no such thing as a surrender of the life-estate of the widow (or other limited owner) to the next reversioner and that the same is opposed to principle; and if the question were to arise again in the Madras High Court, it is hoped that the matter will be considered in all its true aspects and an authoritative decision pronounced.

P. R. GANAPATHI AIYAR.

TRANSLATION FROM VAIDYANATHA DIKSHITHIYAM.

The step-mother should be regarded as mother.

In the matter of marriage, the relatives in the line of the step-mother to five degrees should be excluded. Although in the case of the step-mother the *sapinda* relationship of connection by particles of the same body does not exist, the existence of

sapinda relationship is in her case established by an extended application of that term. (1) *Sumantu* says: 'All the wives of the father are mothers; their brothers, maternal uncles; the daughters of these, the daughters of maternal uncles; their sisters, mother's sisters; the daughters of these, mother's sister's daughters; their daughters, sisters; and the issue of these, the issue of the sisters; therefore they should not be married. Otherwise (if married) they would be making unlawful intermarriages. (2) The *sapinda* relationship (of the step-mother) is also spoken of in the *Srutis* and the *Smritis* as follows: 'She becomes one with the husband in *pinda*, *gotra* and pollution.' As the husband and the wife are *sapindas*, because of their making together but one body, sons, etc., through the connection by particles of the body of their father become *sapindas* with their step-mother and her *sapindas*. Therefore alone in the texts ['*Māthrithah Pithrithasthathā.*' '*Māthribandhubhyah Panchamam Māthripakshachcha*'] and other texts, the general word '*Māthā*' (mother) is used, not the word '*Janani*' (one who brings forth). Therefore the persons related as *bandhus* in the line of the step-mother should be excluded as those in the line of the mother. (3) Another *Smriti* says: 'A man should exclude his brother's wife's sister and her daughter and his father's wife's sister and her daughter.' *Commentary*—As the general term '*pithri*' is here used, persons within seven degrees in the line of the father, other than the natural father should also be excluded. (4) *Gautama* also says thus: 'Marriage should be between persons not of the same *Pravara* and removed by more than seven degrees in the father's line and in the line of the owner of the seed.' *Commentary*—A son begotten upon another's wife by *Niyoga* becomes the son of both. *Yajnavalkya* says that a son begotten by a sonless man upon another's wife by *Niyoga* becomes the heir of, and the giver of the funeral cake to both, according to law. Another *Smriti* also says that he becomes the *Dvyāmushyayana* of the owner of the seed and the owner of the soil. Similarly, in the case of the adopted sons, etc., both the *gotras* should be excluded because of their *Dvyamushyayana* character. 'The adopted son will not have the *gotra* or the property of the natural father, but he whose *upanayana* has been performed in the natural father's *gotra* becomes after adoption a man of two *gotras*. He whose *gotra* is not known takes the *gotra* of the man who performs his *upanayana*; but he

whose *gotra* is known becomes, like the adopted son, a man of two *gotras*. (5) The son adopted, the son bought, the son made, the son of the appointed daughter and the son born of the *Ārsha* form of marriage become *Dvyamushyāyanās* having two *gotras*. Therefore they should marry beyond five and seven degrees in both. This has been settled in *Vijnaneswara's*, *Varadaraja's* and others' works. The author of the Chandrika and others hold the other view. (6) *Markandeya* says: 'One should exclude in marriage as his own mother, a mother who is not his *sapinda*, one whom he has been calling his mother and a sister who is not his *sapinda*.' *Vasishta* says: 'One should always exclude as his own mother, a woman whom he has been calling his sister or his mother and also a mother who is not a *sapinda*.' *Jābāli* says: 'The father, the grandfather and the great-grandfather, these three should be understood as connected by the funeral cake. The three from the grandfather's grandfather upwards are connected by *lepa* or the wipings of the hand. The propositus is the seventh. This is the relation extending to seven degrees, spoken of by the sages.' *Commentary*—Such being the case, as the maternal uncle's son, etc, do not come in for a share in the same *pinda* or cake, they are not *sapindas* and therefore their marriage is certainly sanctioned. The many texts which declare that some consider girls within five degrees on the mother's side and even girls of the mother's *gotra* ineligible for marriage, etc., apply to the case of the appointed daughter and to the issue of women married in the *Āsura* and other forms; otherwise a married woman can have no other *gotra* than that of her husband. Nor could it be said that the married woman retains the *gotra* to which she once belonged. As she could not retain her own *gotra*, she takes the *gotra* of her husband. It is said, 'a woman at the seventh step of the marriage loses her *gotra*. She becomes one with her husband in *pinda*, *gotra* and pollution.' (7) *Lokākshi* says that the son of the appointed daughter is of his mother's *gotra*. 'The son of the appointed daughter should perform the funeral obsequies of his mother, the oblations of food, water, etc, according to his maternal grandfather's *gotra*'; so said *Prjāpathy*. In the matter of the *Āsura* and other forms of marriage, *Markandeya* says: 'Where a girl has been married in the *Brahma* and other forms, her obsequies, such as the offerings of rice balls, libations, etc., should

be performed according to her husband's *gōtra*; and if married in the *Asura* and other forms, according to the *gotra* of the father.' *Commentary*:—The meaning is 'according to the mother's father's *gotra*.' The result is that as in the case of the appointed daughter and in *Asura* and other forms of marriage there is no gift with water and the mother's *sapinda* relationship with the father and her continuance in the same *gotra* do not terminate, she continues to be the *sapinda* of her father, etc. Therefore the texts 'she who is not the *sapinda* of his father and of the same *gotra* with his mother, etc., must be understood as having reference to the case of the appointed daughter, etc. It might be asked why there should be anything said about the mother at all, seeing that the son being the *sapinda* of the mother becomes necessarily the *sapinda* of his mother's *sapindas*; we answer thus: When the son of the appointed daughter is abandoned by his maternal grandfather, then the *sapinda* relationship with him terminates. It may become possible for him to marry a girl who is the *sapinda* of his maternal grandfather. In order that it might not be done, the word 'mother' is here used. Similarly, as an adopted son loses his father's *gotra* by the very fact of his having been given away, a marriage with a girl of the *gotra* of his natural father may become possible. To show that it should not be done the word *pitha* is here used. The marriage of the son of a woman whose *sapinda* relationship has been terminated by her being married in the *Brahma* and other forms with the maternal uncle's daughters, etc., though within five and seven degrees is lawful. All the texts prohibiting marriage with the maternal uncle's daughter, etc., refer to the case of the son of a woman married in the *Āsura* and other forms and also of the son of the appointed daughter. The texts in favour of the marriage of the maternal uncle's daughter, etc., refer to the case of the son of a woman married in the *Brāhma* and other forms. This is the law.

On the marriage of maternal uncle's daughter.

(1) On this point *Narada* says: 'In some countries they narrow the scope of *sapinda* relationship and marry girls in the third degree on the mother's side and in the fifth from the father. A man in the fourth degree may marry a woman in the fourth or even in the fifth degree. But one in the fifth should not marry a

girl either in the fifth or sixth degree. One in the third degree may marry a girl in the fourth, or even in the fifth degree. (2) According to *Shadtrimshanmata*, one may marry, according to *Manu, Parāsara, Angiras* and *Yama*, a girl in the third degree from the mother or in the third degree from the father. (3) According to *Chathurvimshatimata*, one may marry according to *Manu, Parāsara Angiras* and *Yama*, a girl in the third or in the fourth degree either from the mother or from the father. (4) The *Smritisāra* says: 'In some countries they narrow the scope of *sapinda* relationship and marry the daughters of the maternal uncle and the daughters of the father's sister; a man in the fourth degree may marry a girl in the fifth and one in the sixth may marry a girl in the fifth. A man in the fifth may marry a girl in the fourth but not in the fifth; the *Smriti* which says that a man in the fifth degree should not marry a girl in the fifth is a prohibition where the relationship is traced through the father and not where it is traced through the mother. (5) The *Smritiratna* says: 'Eating meals with persons who have not been invested with the sacred thread and wives, and marrying maternal uncle's daughters being approved by men of good behaviour are considered as not censurable among the people of the South. Sea-voyage, eating flesh, military service and drinking wine are according to law not considered censurable among the people of the North. (6) *Brihaspati* says: 'The daughters of maternal uncles are married by men of the regenerate classes in the South. Men in the Central Provinces are mechanics, artisans, cow-eaters and fish-eaters. The women in the East delight in incontinence. In the North, women drink wine and could be touched by men during menstruation, and men marry childless widows of their brothers. The customary observances peculiar to every country, caste and family have been well declared. They are accordingly to be respected, for otherwise there will be disturbance among the subjects. Among the people of the South are now observed the marriage of the maternal uncle's daughter vitiated by the relationship through the mother, and the marriage, much condemned, of the brother's widow. In other countries the marriage of a girl within the family is observed. These customs though condemnable should not be checked when grown. The marriage of the brother's widow is also found among the Parsis. Some are against feeding in subsequent *sraddhas*, those Brahmins who have taken meals at a *Sradh* on the eleventh day.

None of these customary observances is against the Sastras, being peculiar to countries, castes, etc. Therefore a king ought to study Sastras and set about regulating the conduct of his subjects. *Commentary*:—As the mother married in the *Brāhma* and other forms does not retain her '*sapinda*' relationship (in her father's line), the daughter of the maternal uncle may be married. So also the father's sister's daughter. Nor could it be asked why on this view the mother's sister and her daughter could not be married; for, although there is no conflict with the Sastras, they are against the practice of the world. What is censured by the whole world, though lawful, should not be done. (7) *Manu* also says 'One should not do what is censured by the world though lawful.' (8) *Varahamihira* also says: 'The custom of the country must first be considered and that alone which is the established custom in particular countries should be done. The wise abandon whatever is condemned by the world. The astrologer must, therefore, tread the path honoured by the world.' *Commentary*:—Among the Southerns in the Telegu country, even men old in the study of the three Vedas, acting agreeably to the purport of the Vedas and well-behaved, follow the practice of marrying maternal uncle's daughters. Men equally learned and well-behaved in the Dravida countries marry girls in the fourth degree on the mother's side, etc. But in all countries the marriage of the mother's sister, her daughter, etc., is avoided. (9) *Manu* thus speaks of the obligatory force of custom. 'The practice of the well-behaved, the *Smrutis*, the Vedas, this is the threefold test of virtue. Whatever is done by good and virtuous men of the regenerate classes must be presumed to be lawful in the particular countries, families and castes.' (10) *Apastamba* says: 'They alone in whose family certain customs have been followed in succession by their ancestors will not be vitiated by following such customs; not so with others.' (11) *Devala* says 'Whatever custom has been lawfully established in a country should be observed in that country alone; for *Bhrigu* says that it is the custom of the country. Whoever are considered gods, whoever are considered regenerate classes, whatever is considered sacred water, whatever is considered sacred earth, whatever is considered purity, whatever is considered virtuous conduct, these should not be disregarded in those countries where they are so considered; for such is the law there. Whatever is enjoined as lawful in any country,

town, village or place of Vedic learning should not be disturbed.' (12) *Bandhayana* says: 'There are five deviations from law in the South and five in the North. We shall now speak of the five in the South. They are :—eating with one whose *Upanayana* has not been performed, eating along with women, eating of stale food and marrying the maternal uncle's daughter and the father's sister's daughter. The five in the North are :—dealing in wool, drinking of wine, dealing in animals having teeth in both the sides, wearing of swords and sea-voyage. By doing any of these in the other country where it is not permitted, the man becomes blameworthy. Every custom is obligatory in its own place.' *Commentary*—The South is the country between the Narmada on the north and Cape Comorin on the south. The North is the country between the Himalayas on the north and the Vindhya mountains on the south. The discrepancy between the well-behaved people of these two countries is fivefold. The word '*gamana*' means 'marriage.' The word '*urna*' means 'wool and things like carpets made of wool.' 'Having teeth on both the sides,' such as horses, etc. The word '*vyavahara*' means 'sale etc.' The word '*ayudhīyaka*' means 'wearing of swords.' The word '*samudrayāna*' means 'going over to other countries by boats.' One doing any of these acts as eating with one whose *Upanayana* has not been performed in the other country, *i.e.*, the North becomes blameworthy. So also one selling wool, etc., in the other country, *i.e.*, the South, becomes blameworthy. Each custom is obligatory in the particular country where it prevails. This is the clear construction of the text. Therefore, it is clear what should be done and what should not be done. However, *Bandhayana* subsequently adds: '*Gautama* says that this is false and that neither should be followed, because both are seen to conflict with *Srutis* we know.' *Commentary*—This is not to contradict what has been already said; for *Gautama* is mentioned (as holding this view). The Chandrika in commenting on this text says, that this is intended to show *Gautama's* approval of the marriage of *sapindas* of the mother. (13) There is also the text of *Apastamba*, which says, that where conduct is regulated by mere desire, there can be no law. He who follows that course goes to hell. *Commentary* :—This text also must be understood as referring to the marriage of mother's *sapindas*, such as the maternal uncle's daughter, etc. (14) There is also the text of *Vasishtha* which says, that customs obtaining in particular coun-

tries and particular times are obligatory, if not inconsistent with *Srutis*. This text is also in favour of our view, as there is here no conflict with *Srutis*. We hear of a *Sruti* favourable to our view "Āyāhīndra pathibhirīlithebhir yajnamimam no bhāgadheyam jushaswa. Thripthām juhur mathulasyēva yōsha bhāgasthē puithrishwasēyi vapāmiva." *Commentary* :—Come Indra, '*Pathibhih*' means 'by ways,' '*Alithebhih*' means 'worthy,' come Indra to this our sacrifice by worthy ways and having come, taste of the share given you by us. For that purpose only have those engaged in the sacrifice reserved for you the "omentum well fried in ghee." Then follow the examples : "As the maternal uncle's daughter is the share of the daughter's son and as the father's sister's daughter could be married by the son's son." The meaning of the *mantra* is that similarly the omentum is the share of Indra. Thus the marriage of the maternal uncle's daughter is held legal by *Devanabhattopadhyaya*, the author of the *Smriti Chandrika*, on the ground that it is established by *Srutis*, *Smritis* and custom and also by other intelligent men who follow the customs of their countries. Here ends the discussion about the marriage of the maternal uncle's daughter.

Now the families to be avoided in the matter of marriage.

(1). On this point *Manu* says, 'In the matter of marriage let a man avoid the following ten families, though they be great and rich in kine, goat, sheep, gold and grain—the family which has omitted to perform the prescribed rituals, which has produced no male children, where the Vedas have not been studied, whose members have thick hair on their bodies and which have been subject to hemorrhoids, phthisis, dyspepsia, epilepsy, leprosy and elephantiasis." *Commentary*—The word '*hīna kriya*' means 'which has omitted to perform rituals enjoined by the *Srutis* and the *Smritis* ;' '*nishpurusha*' means 'having no male issue.' (This family ought to be avoided for fear that subsequently too no male issue may be born). '*Nischandah*,' means 'not studying the Vedas.' *Romasam*" means 'having much hair.' (This family must be avoided as too much hair is of the nature of *Nirruti* ; for the Sruti says: 'Deformed and hairy body is produced only by *Nirruti*, for that is *Nirruti's* body.') The word '*arsasa*' means 'having piles.' The

word '*kshayi*' means 'subject to phthisis.' '*Amayavi*' means 'dropsy etc.' (That this family should be avoided is but proper, for fear of being tainted with dropsy, etc.) (2) *Yajnavalkya* also says: 'The girl must be chosen from high families of *Srotriyas* celebrated to the extent of ten degrees; but not even from such families where they are subject to contagious diseases.' *Commentary*:—*pūrusha* is the same thing as *purusha*. 'Famous to ten degrees' means 'famous to five degrees on the mother's side and five on the father's.' The family so celebrated is a high family, possessing sons, grandsons, cows, servants, villages, etc. It is said that from such a family the girl should be chosen. The exception is that even from such families, if they are subject to contagious diseases, such as leprosy, epilepsy, etc., no girl should be chosen. This is the drift. (3) *Yama* says: 'The following families are to be declared ineligible in the matter of marriage. The family of Brahmins and *Ritviks*, whose *Pravara* is not known, should be avoided. Families whose members have more or less than usual limbs, those which are subject to dropsy, so also those subject to elephantiasis should be avoided. Families whose members are always lustful, those whose members have thick hair, those which are subject to white leprosy should also be avoided. Families too high, families too low, families that come under no class of caste should also be avoided.' *Commentary*:—The word '*Anarsheya*' means 'whose *Pravara* is not known.' (4) *Manu* says: 'He who would raise the status of his family should always connect himself with higher and higher families and discard lower and lower ones. Those born in high families are always pure by virtue of their rituals, versed in *Srutis* and *Smritis* and leading a life of undisturbed *Brahmacharyam*. Connection with high families is possible only for the high. A man should connect himself with those who are always cheerful, kind to good men, good-natured, impartial, not irascible and easily pleased. One must studiously avoid connecting himself with persons who are addicted to stealing or calumniating, are impotent, atheistic in their tendencies, living by foul occupations, deformed in their persons, indulging in obstinate enmity with men of valour, guilty of treason, miserly or despicable. One must also studiously avoid families whose members are either barren, or prolific of female issue and where the ruler is the husband as also another. The issue inherit the tendencies of the father or of the mother or of both; and one

whose origin is bad will never get the better of his bad nature. (5) *Harita* says : 'The son takes after the maternal uncle and the daughter after the parents, and as the mother has been in her character, so will the son be.' (6) *Vishnu* says : 'A horse should be judged by its father, a girl by her mother, the soil by the grass, and the family by its observances.' Thus the families to be avoided in marriage have been mentioned.

The marriage of girls not of the same caste.

(1). Manu thus permits in special cases the marriage of girls of different castes indirectly prohibited by the injunction that one should marry in his own caste. 'For the first marriage of men among the regenerate castes, a girl of the same caste is most eligible; but for such as are impelled by lust, women in the direct order of the castes are to be preferred. A *Sudra* woman can be the wife of a Sudra; she and a *Vaishya*, of a *Vaishya*; these two and a *Kshatriya*, of a *Kshatriya*; these three and a *Brahmanee*, of a Brahmin.' *Commentary*—Women of the same caste alone should be married. Subsequently, if impelled by desire of sexual enjoyment, women of different castes may in their order be married. Thus it is clear that a Brahmin could marry four wives; a *Kshatriya*, three; a *Vaishya*, two; and a Sudra, only one and of his own caste. Now to show that a Brahmin or a *Kshatriya* may marry from a different caste where one of his own caste could not first be married, but that under no circumstances he could first marry a Sudra, the same author adds; 'A woman of the Sudra caste is not mentioned in any Sastras as the first wife of a Brahmin or a *Kshatriya* though in the greatest difficulties (to find a girl of their own caste).' *Commentary*—The word '*Vritta*' means 'virtue' and '*Anta*' means 'determination,' hence the word '*Vrittanta*' means 'code of virtue or shastra.' This means that a Sudra woman is never enjoined as a wife, but that she is allowed for purposes of sexual enjoyment. The same author thus describes the blame attaching to one who marries a Sudra woman as his first wife. 'Men of the twice-born classes, who, through ignorance, marry women of the servile class, soon degrade the status of their family and of their issue to that of the Sudras.' The same author also says that marrying a Sudra woman and begetting children on her are sinful in a Brahmin. 'A Brahmin who raises a Sudra woman

to his bed sinks into the lower regions, and if he beget a son upon her, loses his Brahmin caste. As his sacrifices to the Gods and to the Manes and his hospitality to strangers mainly require her co-operation, the Gods and the Manes disdain them and he never attains heaven.' After setting out fully the views of others on the subject, the same author thus concludes in favour of his own view. "According to *Atri* and the son of *Uthathya*, he who marries a Sudra woman is instantly degraded; according to *Sounaka*, on the birth of a son; and according to *Bhrigu*, on the birth of a son's son." *Commentary*:—'*Sudravedi*' means 'one who takes a Sudra woman to wife.' The son of *Uthathya* is *Gautama*. *Saunaka's* view is that the man is degraded only by begetting a son upon a Sudra woman, not by merely cohabiting with her. The intention seems to be that a Brahmin who has married a Sudra woman may not cohabit with her for fear that he may beget a son upon her. *Bhrigu's* view is that he is degraded on the birth of a son's son. As the Code of Manu is delivered through *Bhrigu* as his mouth-piece these texts have been commented upon as texts from *Manu*. (2) *Yajnavalkya* says; 'Three, two, and one are respectively enjoined as wives in the order of the castes for Brahmins, *Kshatriyas* and *Vaishyas*. The Sudra can only have a Sudra wife. It is said that the regenerate classes may marry a wife from the Sudra caste. But that is not my view as the husband is born again from his wife.' The Chandrika says that this means the same thing as the text of Manu. (3) *Paitinasi* says: 'Where a Brahmin girl is not available, girls of the other caste may be married. (4) *Jatukarni* says: 'If a (Brahmin) girl is not available let one (a Brahmin) lead the life of a *Bhikshu*, or let him beget sons upon a *Kshatriya* woman or on a *Vaisya* woman.' (5) *Narada* says: 'For a Brahmin, only three wives in the natural order of caste are allowed. A Sudra woman can be married by any one of the other castes in the inverse order. A *Kshatriya* could marry two wives from different castes and a *Vaisya*, one. A *Vaisya* woman could be married by husbands in two other castes than her own, and a *Kshatriya* woman in only one.' (6) *Vishnu* says: 'A Sudra wife of a man of the regenerate castes is useless for acquiring virtue. It has been said that she will be useful for purposes of sexual enjoyment in the case of the love-blind man.' (7) *Vasishtha* says: 'Some without *mantra* marry a Sudra woman. That should not be done; for by such sins the family will certainly

be degraded and shut out from heaven.' (8) *Manu* says: 'For one who has been kissed by a Sudra woman or winnowed by her breath, or who is born of her, there is no expiation prescribed. By following the pursuits of an artisan, by dealing with Sudra children, by dealing in cows, horses and carriages, by agriculture, by service under kings, by performing sacrifices which ought not to be performed, and by atheistic conduct, high families become degraded owing to the absence of *mantra*. *Commentary.*—This marriage between persons of different castes has reference to other Yugas, because it is prohibited in the Kali Yuga by the text, 'As also the marriage by the regenerate castes, of girls of different castes from their own.' Here ends the dissertation on marriage between persons of different castes.

NOTES OF INDIAN CASES.

Pakiam Pillai v. Innasi Fernand, I. L. R., 19 M., 458. The withdrawal of an application for probate cannot operate as a bar to the applicant propounding the same will as a caveator unless there be any statutory provision to that effect. The procedure of the Code is only made applicable in contentious cases under the Succession Act. Whether the special statutory bar contained in S. 373 is a rule of procedure within the meaning of the words of the Succession Act may be open to question. But assuming that it is, before the proceedings became contentious, the application for probate is withdrawn; and therefore, the procedure is not necessarily applicable. There is no case of *res judicata* as there was no decision and the learned Judge seems properly to hold that the caveator was not barred.

Kariadan Pokkar *v.* Kayat Beeran Kutti, I. L. R., 19 M., 461. The question in this case is one of some difficulty. The provision for maintenance under S. 488 of the Criminal Procedure Code was, as it has been pointed out by the High Court, enacted to check vagrancy. The question, therefore, as to what the law of marriage applicable to the parties is, does not arise. If a person is the father of illegitimate children, the point for consideration will be, assuming that he has sufficient means, does he neglect or refuse to maintain the children. The children should be unable to maintain themselves to entitle the Magistrate to make an order for an allowance. The inability to maintain itself in the case of a child will depend upon its age or physical infirmity. Can the putative father be said to neglect or to refuse to maintain a child

where by the civil law of the country, the duty is cast upon other persons to maintain it?

Where the child is as a matter of fact receiving such maintenance from those, who by law are bound to maintain it, there is no question of neglect or refusal. Unless the section is regarded as merely providing a summary remedy, where, by the civil law, there is a duty to provide maintenance, we should be disposed to agree with the learned Judges in thinking that a right or correlative duty is created by the section; the result of which is, that, where, as a matter of fact, the child is not maintained by those bound by law to do so, the putative father must be said to neglect or refuse to maintain. Although the word "neglect" in the section might suggest the breach of a duty, the word "*refuse*" cannot indicate anything of the kind. We are, therefore, disposed to think that even where a child is not maintained by those bound to maintain it, the putative father may be made liable.

We think, however, the question of custody of a child, or as to who makes the application on behalf of the child has no place in the determination of the right to receive maintenance. It appears to us that the learned Judges have mixed up questions arising under the civil law in determining a case arising under S. 488, which makes no reference to the propriety or otherwise of a custody. See Weir, 1104 & *Lal Das* v. *Nekanjo Bhaishiani*, I. L. R., 4 C., 374.

Chinna Ramanuja Aiyangar v. **Padmanabha Pillayan**, I. L. R., 19 M., 471. There are two points of importance decided in this case. Is a payment by a debtor to one of two joint creditors a valid discharge. Their Lordships do not answer this general question but hold that where there was an agreement between joint creditors that one of them shall receive it and the debtor had notice, payment by him to the other cannot be a valid discharge of the debt. As regards the other question, there was hardly any difficulty but for the judgment of *Farran* J. in *Sowdamini Dasi* v. *Broughton*, I. L. R., 16 B., 574. We see no objection to several partners being made liable upon a bond executed by one of them or upon a lease or a mortgage.

Rustam Singh *v.* **Moti Singh**, I. L. R., 18 A, 474. We are disposed to doubt the correctness of this decision. Where a daughter has inherited property from her father, it does not appear to us that the expenses of her daughter's marriage are a proper charge upon the estate. The learned Judges cited no authority for the position that they are, and we think, the daughter's daughter being a person who can possibly have no claim upon the property of her maternal grandfather, cannot have

marriage expenses defrayed out of the estate. The maintenance of the daughter who inherited the estate would alone seem to be justifiable necessity for dealing with the estate.

Rahim Ali Khan v. Phul Chand, I. L. R., 18 A, 481. We are glad that the Full Bench of the Allahabad High Court has decided that where an application is made more than twelve years from the date of the decree, to take some step in furtherance of the application for execution presented under S. 235, it is not barred by the provision contained in S. 230. Where an execution petition is pending or where attachment subsists it will be monstrous to hold that a further application to sell the property though presented after the twelve years specified in S. 230, is barred by the provision contained in that section.

Abbubakur Saheb v. Mohidin Saheb, I. L. R., 20 M., 10. *Shephard & Subrahmania Aiyar,* J.J., hold that the judgment-debtor is not entitled to have a sale set aside merely on the ground of fraud of the decree-holder and they suggest that the auction-purchaser should be a party to the fraud.

We hesitate to accept this as sound law. There is no provision in the Code dealing with the setting aside of sales on the ground of fraud. But, upon general principles it has been held, that in execution proceedings the sale is liable to be set aside on the ground of fraud. It is not a question between the decree-holder and the judgment-debtor, nor does it appear to us to be of consequence that the fraud is discovered after the confirmation of the sale. The validity of the execution proceedings vitiated by fraud is a question between parties to the decree and the fact that the interests of the auction-purchaser would be affected by the result of the decision cannot make his complicity a condition precedent to the setting aside of the sale. In a recent case, the Privy Council held that a question between parties should be adjudicated upon under S. 244, even though the auction-purchaser's position be affected.

Pattibhiramayya Naidu v. Ramayya Naidu, I. L. R, 20 M., 23. Article 99 of the Limitation Act appears to be rather curiously worded. It only applies to the case of a person suing for contribution who has paid the whole amount of the decree and not merely something in excess of his share. But the time against him begins to run under the Article when the advance exceeds the share. The Article would appear to require amendment. There is no doubt, however, that the learned Judges are right in holding that the Article, as it stands, does not apply to a case where the whole amount is not paid, but Article 61 would apply.

Queen-Empress v. Krishtappa, I. L. R., 20 M., 31. This case raises a question of some nicety. A witness summoned to appear before a public functionary failed to attend at the place specified. The officer himself was absent. S. 164 speaks of a mere intentional omission to attend. There is no doubt in this case that the omission was intentional. But mere intention alone on his part is not punishable. His attendance before the public officer was impossible as the officer was absent. He had no knowledge of the absence of the officer and though there was intentional omission on his part, the learned Judges seem to us, to rightly hold, that the attendance before the officer should have been possible but for the witness's wilful abstention, and that he was therefore not liable under S. 174.

SUMMARY OF RECENT CASES.

Bills of exchange—Duty of acceptor in looking to the form of the bill.

Scholfield v. Earl of Londesborough [1896, A. C., p. 514.]

The law does not impose on every person who accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of any forgery being committed in it. Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of the parties in excluding all possibility of committing it.

S drew a bill for 500£ with a stamp of a much larger amount than was necessary and with spaces left and presented it for acceptance to the defendant who accepted it in the usual course of business and handed it over to S, the drawer. S afterwards filled up the blanks left in the bill and fraudulently converted it into a bill for 3,500£ and negotiated it. The plaintiff became a *bonâ fide* holder for value of this bill and sued the acceptor on the bill as it stood, *i.e.*, for 3,500£. The acceptor paid 500£ in Court and pleaded that he was not liable for the rest.

Held: affirming the decision of the Court of Appeal that the defendant was under no duty of precaution to the plaintiff, and was guilty of no negligence, and was consequently entitled to judgment. *Young* v. *Grote* (4 Bing., 253) commented on and the actual decision in the case approved.

Duties of Executors and Trustees—Investments.

In re **Chapman, Cocks** *v.* **Chapman** [1896, II Ch. D., 763, C. A.]

There is no rule of law which compels a Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to adopt in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances must be borne by the owners of the property, *i.e., cestuis que trust*, and cannot be thrown by them on the trustees, who have done no wrong, though the result may prove that they possibly might have done better. To render the trustees liable in such a case, wilful default, including want of ordinary prudence, must be proved.

The duty of executors is simply to call in the testator's unsecured debts, and to convert into money so much of his personal estate as is necessary to enable them to pay his funeral and testamentary expenses and his debts and pecuniary legacies. No doubt, speaking generally, it is the duty of executors to get in debts due to the testator; but it is no part of the duty of executors as such to realize mortgage securities of their testator not wanted for the abovementioned purposes.

Res judicata—Estoppel.

In re **Lart Wilkinson** *v.* **Blades** [1896, II Ch., 788, *Chitty, J.*].

A testator had by his will given two life estates in two trust funds to his two daughters under exactly similar circumstances. One of the daughters having died without issue a question arose as to what was to become of the capital of the fund of which she was tenant for life. The Court put a particular construction on the will and held that the corpus of the fund passed to the then surviving children of the testator. Neither the other daughter, nor her husband, was a party to these proceedings, but both of them were fully aware of the suit and its nature and the judgment in it and with full knowledge of the circumstances deliberately took the benefit of the order. In the division of the particular fund then in question both of them received a large sum under the construction put upon the will by the Court. The other daughter subsequently died, and her husband then sued to have a different interpretation put upon the will with regard to the fund of which his

wife was possessed as a life-tenant and the succession to the corpus which became a matter of dispute after her death.

Held: that, although the previous judgment could not bind the plaintiff in this suit, still he was estopped by his conduct after the judgment and under the judgment, and was not entitled to re-open the same question as was formerly decided though the question may arise with respect to a different fund in the same will.

An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity.

Procedure Lexfori—Administration of Assets.

In **Doetsch. Matheson** *v.* **Ludwig** [1896, II Ch. D., 836, *per*: *Romer, J.*]

Some creditors of a firm carrying on business in Spain brought an action in England, on behalf of the firm's creditors, against the executors of a member of the firm (who had died in England leaving property there) claiming that his estate, after payment of his separate debts, was liable for the firm's debts, and asking for administration on that footing. The defence raised was that under Spanish law the creditors of a firm had first to exhaust the assets of the firm before they could have recourse to the estates of the individual members.

Held: that, according to English Law a creditor of a partnership of which one member is dead, is entitled as a creditor to share in the administration of the estate of that deceased partner after the separate debts are paid, without first proving that the surviving partner is insolvent, and without being obliged first to have recourse to the joint assets and that this is a mere matter of procedure;

that the proper order and priority of distribution of assets is always a matter for the lexfori, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution; and

that consequently that the defence raised was bad.

Practice—Procedure.

In re **Nobbs, Nobbs** *v.* **Law Reversionary Interest Society** [1896, II Ch. D., 830, *per*: *Kekewich.*]

In the Indian Code of Civil Procedure there is no provision apparently, to enable parties to a deed to apply to the Court by an originat-

ing summons for the determination of any question of construction arising under the deed without asking for anything further. Order LIV, r. 1, under the Judicature Acts runs as follows:—In any division of the High Court, any person claiming to be interested in any deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the Instrument and for a declaration of the rights of the persons interested. In this case the mortgagor of a reversionary interest applied under this order for the determination of the question whether according to the true construction of the mortgage deed, he was entitled to redeem, during the period fixed by the deed for the continuance of the loan. *Kekewich*, J, held that the Court was bound to decide the question and ought not to put the mortgagor on the terms of offering to redeem.

Voluntary Liquidation—Transfer of Shares.

In re **National Bank of Wales** [1896, II Ch. D 851, *Per*: *Vaughan Williams.*]

Where a company is voluntarily wound up, the liquidator, although he may sanction a transfer of shares after the commencement of the winding up, and alter the register of members accordingly, has no power to allow an alteration of the status of the transferor so as to free him from his liability as a contributory. The transfer is effective so as to entitle the transferee to go on the register and claim in his own name any rights as to distribution of surplus or adjustment of the rights of members *inter se*. But the sanction of the liquidator cannot free the transferor from his liability. If that can be done, it must be done under some power which is in the Court and not by the liquidator alone.

In a voluntary liquidation a transferee of shares (with the sanction of the liquidator) is not liable as a contributory, although he may be liable as a member of the company, but he is bound to indemnify the transferor (*vide* S, 175, Act VI of 1882).

Search warrants.

Jones v. **German** [1896, II Q. B. D 418, *Per*: *Lord Russel of Killowen, C.J.*]

The defendant had applied for a search warrant against the plaintiff upon the following sworn information; "he hath just and reasonable cause to suspect and doth suspect that (the plaintiff) has in his possession cer-

tain property belonging to the defendant, that he (the plaintiff) has been in his employ for five years and is now under notice to quit, and that he has requested him (the plaintiff) to allow him to search several boxes which he (the plaintiff) has had packed ready to be taken away, but which he refuses to be looked through."

Upon this a warrant was issued by the Magistrate which was executed. In an action of trespass by the plaintiff against the defendant:

Held, that in an information an allegation that an offence has actually been committed is not necessary to enable a Magistrate to issue a search warrant, but that it is enough if reasonable grounds are alleged for believing that the goods are being feloniously dealt with by the defendant;

that it is not necessary to specify in the information the particular goods for which a search is desired; and

that the information in question (quoted above) was a perfectly proper one upon which a warrant may rightly be issued.

Judgments in rem.

Bellantyne v. Mackinnon [1896; II Q. B. D. 455 C. A.]

An action was brought by a shipowner against an under-writer, upon a policy which covered his ship against losses occasioned by the perils of the sea.

The ship had during a voyage run short of coal, and the captain engaged a steam trawler to tow to the port of discharge. The owner of the steam trawler then sued the plaintiff in the Admiralty Court and recovered judgment for a sum of money for salvage. The plaintiff now sued to recover this sum from the under-writer who had insured the ship against the perils of the sea.

Held: (on its appearing from the evidence that, beyond the falling short in coal, the ship was not in any manner of distress, and that she could easily have proceeded under sail), that the loss did not arise by any perils of the sea, but arose solely by reason of the inherent vice of the subject-matter insured, and that the defendant was not precluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against.

A judgment *in rem* by a court of competent jurisdiction is conclusive against all the world as to the status of the *res*, that is, of the thing

adjudicated upon—in the case in question that a valid maritime lien to the amount already adjudicated upon attached to the ship—but is not conclusive against persons not parties to the suit as to the grounds upon which the judgment must have proceeded.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications :—

The Educational Review for January 1897 (*in exchange*).

Green Bag for January 1897 (*in exchange*).

Allahabad Weekly Notes for January 1897 (*in exchange*).

The Canadian Law Times for January 1897 (*in exchange*).

The Albany Law Journal for January 1897 (*in exchange*).

Pleadings in Indian Courts by Pundit Sheo Narain, Pleader, Chief Court, Panjab, published by the Civil and Military Gazette Press, Lahore.

The Indian Evidence Act with Notes by Sir William Markby, published by Henry Frowde, Oxford University Press, Warehouse, Amen Cornor, E. C., London. Price 3*s*. 6*d*. net.

The Court Fees Act and the Suits Valuation Act with Notes by C. V. Visvanatha Sastri, B.A., B.L., High Court Vakil, Madras, published at the Vijiyanti Press, Egmore, Madras.

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Outwitting a Judge without lying.—A good story is related of a juryman who outwitted a Judge, and that without lying. He ran into Court in a desperate hurry and quite out of breath and exclaimed :—

" Oh ! Judge, if you can, pray excuse me. I don't know which will die first, my wife or my daughter.

" Dear me, that's sad," said the innocent Judge. " Certainly, you are excused."

The next day the juryman was met by a friend, who in a sympthetic voice asked :—

" How is your wife ?"

" She's all right, thank you."

" And your daughter ?"

" She all right too. Why do you ask ?"

" Why, yesterday you said you do not know which would die first."

" Nor do I. That is a problem which time alone can solve ".—*The Green Bag.*

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Mr. Justice Brewer on Lawyers.—In an address recently delivered before law students of the University of Maryland, Mr. Justice Brewer, of the Supreme Court of the United States, thus exhibited the humorous side of his character:—

It is a blessed thing to be a lawyer, providing always that you are of the right kind; and I take it, no one is permitted to graduate at this law school unless he is of the right kind. It is the rule of our profession to work hard, live well and die poor. To such a life I most cordially invite you.

Never sign your own name as plaintiff or defendant, but only as counsel.

One class of persons would as soon expect to find a baby that never cried, a woman that never talked, a Shylock loaning money without interest, a Mormon advocating celebacy, a gentleman without a cent opposed to the income-tax or a candidate for the presidency hurrying to empress himself on the silver question, as an honest lawyer.

I admit that lawyers do not support themselves by planting potatoes or plowing corn, though there is many an attorney who would bless himself and bless the bar and bless all of us if he struck his name off the Court rolls and entered it on the books of an agricultural society.

We are not, as a profession physically speaking, like Pharoah's lean kine. Those pictures which Dickens, that prime of slanderers, and others like him, draw and call attorneys, are nothing but atrocious libels.

From time immemorial, size, physical as well as mental, has been considered one of the qualifications of a Judge. Justice and corpulence seem to dwell together. There appears to be a mysterious and inexplicable connection between legal lore and large abdomens. I do not know why this is, unless it be that in order Justice may not easily be moved by the foibles and passions of men, she requires as firm and as broad a foundation as possible.

George Washington's hatchel is not popularly regarded as one of the heirlooms of the legal family. I can say that for over thirty years I have been a judge, and of the many thousands of lawyers who have appeared before me I have never found but a single one upon whose word I could not depend.

While other professions and vocations are constantly putting on striped clothes, how seldom does any lawyer respond to a warden's roll-call?

The business man needs us to draw his contracts, the labourer to collect his wages, the doctor to save him from the consequence of his mistakes, the preacher to compel the payment of his salary, the wife to obtain a divorce and the widow to settle her husband's estate. The people need us in in the legislature and in the Congress to hold the offices and draw the salaries. Every convention and public meeting needs us to fill the chair and occupy comfortable seats on the platform. Every man accused of crime needs us to establish his innocence through the verdict of twelve of his peers.

In short it may be said of us, in the language of itinerant vendor of soap: "every body needs us," and, like that very useful article, nothing tends to keep society so clean as the presence of a lawyer.

Blot from Amrican history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society to-day, the lawyer, with the work that he does, and you will leave the society as dry and shifting as the sands that sweep over Sahara.—*American Law Review.*

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Malicious prosecution: Liability of a Municipal Corporation for malicious prosecution.— In the case of *Wilson* v. *Winnepeg*, it was held that a Municipal Corporation may be liable to an action for damages for a malicious prosecution. This decision goes further than any case of which we have knowledge.—*American Law Review.*

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Damages for mutilating dead bodies.—In the case of *Foley* v. *Phelps*, it is held that a wife, as such, may recover damages for the unlawful dissection of the remains of her husband; citing and following a case in Minnesota, where the same was held. Such a recovery was, however, denied by the Supreme Court of Colorado, where the dissection was made in the performance of an autopsy upon the body of one who had died suddenly, in order to enable the physician to give a certificate such as was required by law as to the cause of death.—*American Law Review.*

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The way of the physician is hard.—An interesting example of the extent of a physician's liability for negligence is furnished by a recent decision of the Supreme Court of Massachusetts, *Harriott* v. *Plimpton*, 44 N. E. Rep., 992. The facts of the case were briefly as follows:—The plaintiff, who was engaged to marry the daughter of M., was falsely

accused of being afflected with a venereal disease. M. employed the defendant, a physician, to examine the plaintiff, who consented to the transaction and to report the result to himself and family. The defendant mistakenly pronounced the disease to be venereal. In consequence the engagement was broken. The Court held that the defendant's duty of exercising ordinary diligence, care, and skill in a professional undertaking extended to a case where only information was sought; and that the breaking of the engagement was a damage not too remote to sustain the action. This conclusion, it is submitted, is entirely correct. The evident justice of the result, however, is at first more apparent than the really-substantial grounds of decision which a further consideration of the case reveals.

It is a perfectly well-established principle of law, "that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character." 2 Beven, Neg., 2d Ed., 1397. (*Sears* v. *Prentice*, 8 East, 348.) This duty arises out of the fact of the undertaking merely, and therefore is not at all dependent upon the existence of any contractual relation. The plaintiff's right to careful and skilful treatment then was in no wise affected because the defendant was employed by M. *Pippin* v. *Shephard*, 11 Price, 400; *Longmeid* v. *Halliday*, 6 Exch., 761, *per* Parke, B., at p. 767; *Dubois* v. *Decker*, 130 N. Y., 325; see also an article on Gratuitous Undertakings, 5 Haward Law Review, 222.

The defendant would have been bound to use due diligence in performing an operation or in prescribing a remedy. Was the duty of care any less in making an examination for the sole purpose of giving information to those interested? If legal damage might result in each case, it would seem irrational to draw distinctions. Legal damage certainly resulted in this case. As early as the sixteenth century, loss of marriage, whether the plaintiff was man or woman, was held to be injury sufficient to support an action of slander. (*Dane. Morrison's Case*, Jenk., 316; *Davies* v. *Gardiner*, Popham, 36; *Mathew* v. *Crasse*, 2 Bulst., 89. There is no reason why it should not equally well support the action for negligence. The only remaining question is whether the damage was too remote. It was surely a natural and proximate result, and in view of the fact that part of the defendant's task was to report to M's family it was not only a probable, but an intended consequence. Unusual as the steps to the decision at first appear, the conclusion is found to be sound in point of principle and law.—*Harvard Law Review.*

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Bills and Notes—Failure of consideration—Sales—Rescission.—Held, that a promissory note given for a pony, the title to the pony to remain in the vendor until payment of the note, and the vendee having the option to rescind the sale before the note is due, is void for failure of consideration, where the pony, died before the option was exercised. *Lyon* v. *Stills*, 37 S. W. Rep., 280 (Kun).

This case stands or falls according to whether the risk of loss was on the vendee or vendor. The principal case is *contra* to the latter view, that it was on the vendee and that the title remained in the vendor simply as security, a sort of chattel mortgage (*Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S., 268.) The privilege of option should not shift the liability of loss from vendee or vendor. Had the vendee agreed to take the pony if he liked it, instead of agreeing to give it up if he did not like it, the loss would have been on the vendor. *Carter* v. *Wallace*, 42 N. Y., 190; *Hunt* v. *Wyman*, 100 Mass, 198. The Court, however, seem to have lost sight of this distinction, although the facts are somewhat meagrely reported.—*Harvard Law Review.*

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Rules for regulating the practice as to retainers of counsel prepared by the Bar Committee.

Approved by the Attorney-General 3rd June 1892.

Approved by the Council of the Incorporated Law Society 26th June 1892.

General Retainers.

I. General retainers are either ordinary or limited.

II. An ordinary general retainer applies to the Supreme Court and House of Lords.

III. A limited general retainer applies to the tribunal or tribunals or court or courts to which it is expressed to be limited.

IV. A separate general retainer must be given for the Privy Council.

V. A separate general retainer must be given for Parliamentary Committee.

VI. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted.

VII. Subject to these rules a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited.

VIII. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer.

IX. Where a general retainer has been given and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only.

X. Where a general retainer has been given for one person, and he is party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply, and remains unaffected.

Special Retainers.

XI. A special retainer cannot be given until after the commencement of an action, appeal, or other proceeding.

XII. A special retainer in an action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that court.

XIII. A special retainer in an action or proceeding other than an action or proceeding in the Supreme Court gives the client a right to the services of the counsel during the whole progress of such action or proceeding.

XIV. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always:

> A special retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only.

Where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone.

See the report referred to in the note to rule 20 Ingra.

Circuit Retainers.

XV. A special retainer must be given for a particular assize.

XVI. If the venue be changed for another place on the same circuit, a fresh retainer is not required.

XVII. If the action be not tried at the assize for which the retainer is given the retainer must be renewed for every subsequent assize until the action is disposed of, unless a brief has been delivered.

XVIII. A retainer may be given for a future assize; without a retainer for an intervening assize, unless notice of trial shall have been given for such intervening assize.

Appeals.

XIX. When a counsel has held a brief for any party in action or proceeding but has not received a general or special retainer, he shall not accept a general retainer or special retainer or a brief on appeal (including in that expression appeals to the House of Lords and to the Privy Council) for any other party, without giving the original client the opportunity of retaining or delivering a brief to him.

Opinions and Pleadings.

XX. Counsel who has drawn pleadings or advised or accepted a brief, during the progress of an action on behalf of any party shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief the opportunity of retaining or delivering a brief to him; but such counsel is entitled to a brief at the trial and on any interlocutory application where counsel is engaged; unless express notice to the contrary shall have been given to him with instructions to draw such pleadings or advise, or at the time of the delivery of such brief; provided always, such counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee.

See the report of the General Council at the Bar upon a case submitted to them under this rule, 30 L. J. N. C., 136.

XXI. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and in any such case it is the duty of the counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings and in case he has received such retainer or brief inadvertently, to return the same.

Promotion of Counsel.

XXII. The retainer of a counsel does not cease upon his being promoted to a higher rank at the bar.

Amount of Fees.

XXIII. The fees for general retainers are as follows:—

In Parliament (Committees)	Ten guineas.
In all other cases	Five guineas.

XXIV. The fees for special retainers are as follows:—

In Parliament (Committees)	Five guineas.
In the House of Lords and Privy Council	Two guineas.
In all other cases	One guinea.

PRE-AUDIENCE OF THE ADVOCATE-GENERAL.

(Re-printed from Brooke's Reports.)

CORAM NORMAN J:—The Officiating Advocate-General having claimed pre-audience, the claim was questioned by the senior member of the bar, but was allowed.

Held, that down to the transfer of the Government of India to Her Majesty, the Advocate-General of the East India Company, was not entitled as such to pre-audience in the Courts with a patent of precedence;

that the Attorney and Solicitor-General in England enjoy precedence as representing the Sovereign and not by patent;

that the Advocate-General and Officiating Advocate-General, for the time being, are entitled to similar precedence as the Attorney-General in England.

On the motion being called on to-day according to the order of seniority at the bar, the Officiating Advocate-General, Mr. Graham, said; "I feel it my duty to submit to your Lordship the question whether, as holding the post of the chief law officer of Her Majesty in this Presidency, I am not entitled to precedence in the Court. I do this with full

respect for my learned friends whose calls to the bar may date prior to my own. But I consider I am bound to uphold the just rights of the office with which the Government of the country has thought fit to entrust me. Having asserted this claim, I shall leave it to your Lordship to determine as to its validity."

BELL;—I am glad that this question should be discussed in a friendly way. But I think the application of my learned friend wholly without precedent. When the Advocate-Generals were Advocate-Generals of the East India Company, they were Advocate-Generals of the Sovereign power in India, and when the country was transferred to the Queen, the position of Advocate-General was not materially altered, for every Crown business was conducted by the Advocate-General by the direction of the East India Company. When the Advocate-General came out from England with a complete appointment, it was usual for the bar to give him the same seniority as that the Attorney-General had in England. That was the case with Mr. (afterwards) Sir Charles Jackson. He afterwards obtained a patent of precedence. In Mr. Turton's case the claim was not general here, as the chief law officer was the proper person to file information on the part of the Crown. Moreover, since Mr. Turton's time the form of the Government of the country has changed, and the office is now held immediately of the Crown itself, and the acting office is conferred by the Viceroy as representing the Crown.

NORMAN J.—Mr. Graham as Officiating Advocate-General claims a right of pre-audience and it appears that a similar right was claimed by Mr. Turton, Officiating Advocate-General in January 1840, when the late Supreme Court intimated the inclination of their opinion against it, and the claim was not then pressed. See Mortan's Report, (p. 283.) On referring to the Crown Office, I find that patents of precedence and pre-audience in all Courts were granted to Messrs. Peele, Lyall, Covile, Jackson, Ritchie, whose patent is dated on 1st November in the 19th year of the reign of Her present Majesty. It appears to be clear that down to the date of the transfer of the Government of India to Her Majesty the Advocate-General of the United Company of Merchants Trading to the East Indies though for certain purposes entitled to represent the King under the Statute 53 Geo. III, ch. 155, was not as such entitled to pre-audience in the Courts without a patent of precedence. But by the 21 and 22 Vict., ch. 106, the Government and the territories of the E. I. Co. became vested in Her Majesty. By S. 29 it was enacted that the appointment of Advocate-General should be made by Her Majesty under Her Royal Sign Manual. By S. 30 it was enacted that appointment to offices and employment in India, which by law or under any

regulation, usage or custom were then made by any authority, in India, should continue to be made in India by the like authority and by S. 58 persons holding offices or employments under the Company in India are thenceforth to be deemed to hold such offices under Her Majesty. The effect of these enactments is that the Advocate-General is now the Advocate-General of Her Majesty, and the same observations apply to the Officiating Advocate-General whose appointment I imagine comes under the 36th Section of 21 and 22 Vict., ch. 106. On enquiry I find that Mr. Cowie, whose appointment was since the passing of the above Act, has never filed the patent of precedence which he possesses. In the English Courts, the Attorney and Solicitor-General and all the King's counsel are entitled to precedence over other members of the bar, and amongst those included in the King's warrant rank the Attorney and Solicitor-General of the Queen Consort apparently, not by virtue of any patent of precedence, but on account of the Queen Consort whom they represent in Court. (1 Blackstone's Commentaries, p. 219.) It is evident from the long contest for precedence between the Sargeants and the Attorney and Solicitor-General in England, which is alluded to by Lord Coke in the preface to the Tenth Report and by Lord Campbell in the Lives of the Lord Chancellors, Vol. II, p. 292, that precedence was ultimately accorded to the Attorney and Solicitor-General as representing the Sovereign and not by virtue of any special patent of precedence. For if there had been such patent, there could have been no contest. The Royal Mandate in 1864, which for the first time gave to the Attorney and Solicitor-General precedence and pre-audience before the King's Premier Sargeant and the King's ancient Sargeant (See 6 Taunton, 424, and 2 Vesay and Beame, 422) merely regulates the order of precedence amongst those who are already His Majesty's counsel. I do not think that the Royal Warrant of Precedence of July 1862 giving to the Advocate-General rank with the first class of Civil Servant in any way affects the present question. But upon the grounds already alluded to I think that since the passing of the statute 21 and 22 Vic. ch. 101, the Advocate-General and the Officiating Advocate-General for the time being are entitled to pre-audience.

REVIEWS.

The Madras Rent Recovery Act, VII of 1865, with Notes by *B. Krishna Rao*, B.A., B.L., High Court Vakil, Salem, published by Messrs. Srinivasa Varadachari & Co.:—

This is a modest but useful book of reference on the Madras Rent Recovery Act. Annotators of Acts often commit the fault of giving at length the facts of cases referred to, thus increasing the size of the books and increasing the labour of finding out the points decided. The statement of the facts of cases referred to can never dispense with the necessity for consulting and quoting the original reports. Mr. Krishna Rao is quite free from this fault and gives only the points decided in cases quoted by him. Reference has been rendered easy by copious marginal notes.

The Court Fees Act and Suits Valuation Act by *C. V. Visvanatha Sastri*:—

This is a very neat and useful annotated edition of the Court Fees and Suits Valuation Acts. The notes are clear, succinct, well arranged and full. We congratulate Mr. Visvanatha Sastri on his performance and hope he will follow up this work by annotations of other Acts. The get-up of the book leaves nothing to be desired. Another useful feature of the book is that the author has adopted the new English practice of giving the years of the cases cited.

XXI. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and in any such case it is the duty of the counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings and in case he has received such retainer or brief inadvertently, to return the same.

Promotion of Counsel.

XXII. The retainer of a counsel does not cease upon his being promoted to a higher rank at the bar.

Amount of Fees.

XXIII. The fees for general retainers are as follows;—

In Parliament (Committees)	Ten guineas.
In all other cases	Five guineas.

XXIV. The fees for special retainers are as follows;—

In Parliament (Committees)	Five guineas.
In the House of Lords and Privy Council	Two guineas.
In all other cases	One guinea.

PRE-AUDIENCE OF THE ADVOCATE-GENERAL.

(*Re-printed from Bourke's Reports.*)

[CORAM] NORMAN J.*

The Officiating Advocate-General having claimed pre-audience, the claim was questioned by the senior member of the bar, but was allowed.

Held, that down to the transfer of the Government of India to Her Majesty, the Advocate-General of the East India Company, was not entitled as such to pre-audience in the Courts with a patent of precedence;

that the Attorney and Solicitor-General in England enjoy precedence as representing the Sovereign and not by patent;

that the Advocate-General and Officiating Advocate-General, for the time being, are entitled to similar precedence as the Attorney-General in England.

On the motions being called on to-day according to the order of seniority at the Bar, the Officiating Advocate-General, (*Mr. Graham*) said; "I feel it my duty to submit to your Lordship the question whether,

* 1865, May, 2.

as holding the post of the Chief Law Officer of Her Majesty in this Presidency, I am not entitled to precedence in this Court. I do this with full respect for my learned friends whose calls to the Bar may date prior to my own, but I consider I am bound to uphold the just rights of the office with which the Government of the Country has thought fit to entrust me. Having asserted this claim, I shall leave it to your Lordship to determine as to its validity."

Bell;—I am glad that this question should be discussed in a friendly way, but I think the application of my learned friend wholly without precedent. When the Advocates-General were Advocates-General of the *East India Company*, they were Advocates-General of the Sovereign power in *India*, and when the country was transferred to the Queen, the position of Advocate-General was not materially altered. Formerly, Crown business was conducted by the Advocate-General by the direction of the *East India Company*. When the Advocate-General came out from *England* with a complete appointment, it was usual for the Bar to give him the same seniority that the Attorney-General had in *England*. That was the case with Mr. (afterwards *Sir Charles*) *Jackson*. He afterwards obtained a patent of precedence. In *Mr. Turton's* case the claim was not general as here, as the Chief Law Officer was the proper person to file information on the part of the Crown. Moreover, since *Mr. Turton's* time the form of the Government of the Country has changed, and the office is now held immediately of the Crown itself, and the acting office is conferred by the Viceroy as representing the Crown.

NORMAN J.—*Mr. Graham*, as Officiating Advocate-General, claims a right of pre-audience and it appears that a similar right was claimed by *Mr. Turton*, Officiating Advocate-General in January 1840, when the late Supreme Court intimated the inclination of their opinion against it and the claim was not then pressed; See *Morton's Reports*, (*p.* 283.) On referring to the Crown Office, I find that patents of precedence and pre-audience in all Courts were granted to *Mr. Peele, Mr. Lyall, Mr. Colville, Mr. Jackson, Mr. Ritchie,* whose patent is dated on 1st of *November* in the 19th year of the reign of Her present Majesty. It appears to be clear that down to the date of the transfer of the Government of *India* to Her Majesty, the Advocate-General of the United Company of Merchants Trading to the *East Indies* though for certain purposes entitled to represent the King under the Statute 53 Geo. III, ch. 155, was not, as such, entitled to pre-audience in the Courts without a patent of precedence. But by the 21 and 22 Vict., ch. 106, the government and the territories of the E. I. Co. became vested in Her Majesty. By S. 29 it was enacted that the appointment of Advocate-General should be made by Her Majesty

under Her Royal Sign Manual. By S. 30 it was enacted that appointments to offices and employment in *India*, which by law or under any regulation, usage or custom were then made by any authority in *India*, should continue to be made in *India* by the like authority and by S. 58 persons holding offices or employments under the Company in *India* are thenceforth to be deemed to hold such offices under Her Majesty. The effects of these enactments are that the Advocate-General is now the Advocate-General of Her Majesty; and the same observation applies to the Officiating Advocate-General whose appointment I imagine comes under the 30th Section of 21 and 22 Vict., ch. 106. On enquiry I find that Mr. *Cowie*, whose appointment was since the passing of the above Act, has never filed the patent of precedence which he possesses. In the English Courts, the Attorney and Solicitor-General and all the King's counsel are entitled to precedence over other members of the bar, and amongst those included in the King's warrant rank the Attorney and Solicitor-General of the Queen Consort apparently, not by virtue of any patent of precedence, but on account of the Queen Consort whom they represent in Court. (1 *Blackstone's Commentaries p.* 219.) It is evident from the long contest for precedence between the Sergeants and the Attorney and Solicitor-General in *England*, which is alluded to by *Lord Coke* in the preface to the 10th Report and by *Lord Campbell* in the *Lives of the Lord Chancellors*, Vol. II, p. 292, (*Note*) that precedence was ultimately accorded to the Attorney and Solicitor-General as representing the Sovereign and not by virtue of any special patent of precedence, for if there had been such patent, there could have been no contest. The Royal Mandate of 1864, which for the first time gave to the Attorneys and Solicitors-General precedence and pre-audience before the King's Premier Sergeant and the King's Ancient Sergeant (See 6 Taunton, 424, and 2 Vesey & Beames, 422) merely regulates the order of precedence amongst those who were already His Majesty's Counsel. I do not think that the Royal Warrant of Precedence of *July* 1862 giving to the Advocate-General rank with the first class of Civil Servants in any way affects the present question. But upon the grounds already alluded to I think that since the passing of the Statute 21 and 22 Vic. ch. 106, the Advocate-General and the Officiating Advocate-General, for the time being, are entitled to pre-audience.*

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* This ruling of Norman J, has, we are informed, been followed in subsequent cases in Calcutta and the practice in Bombay seems also to be in accordance with it. [E. D.]

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